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UNITED STATES GOVERNMENT

Memorandum

TO : Robert L. Keuch
Deputy Assistant Attorney General
Criminal Division

FROM : George W. Calhoun
Chief, Special Litigation

SUBJECT: Prosecutive Summary

DATE: March 4, 1977

Attached hereto is a copy of a draft of the prosecutive summary. (Corrections are being made).

As you will see, it contains some detailed information which might otherwise be unnecessary, but because Mr. Civiletti does not have a background in this area, the report has been expanded to fill him in and give him a perspective.

It goes without saying you should make any changes you wish, and if it is not acceptable at all, let me know. Also, if you need the underlying report let me know.

~~TOP SECRET~~

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SUMMARY OF TASK FORCE REPORT ON INQUIRY INTO CIA-RELATED
ELECTRONIC SURVEILLANCE ACTIVITIES DISCLOSED IN
ROCKEFELLER COMMISSION REPORT

Preface

As a result of information received from sources indicating that the Central Intelligence Agency (CIA) may have violated the laws regulating electronic surveillance, President Ford asked the Vice-President to head a Commission to investigate the Agency's activities and to prepare a report on the results of the investigation. The final report^{1/} confirmed the existence of a number of questionable surveillances, and that prompted the Attorney General to establish a task force to investigate the Commission's findings and to determine whether there were any other questionable electronic surveillances which might have been conducted.

The investigation (including the Commission's discoveries) uncovered 23 different categories of questionable activities; however, of that group, only eight merit further discussion, for five are barred from prosecution by the statute of limitations, and seven clearly possess no prosecutive potential.

^{1/} "The Report to the President by the Commission on CIA Activities Within the United States."

The following is a summary of the task force's report, a copy of which is attached hereto. This summary is divided into four parts: (1) a review of the applicable Presidential power and other purported sources of authority; (2) a brief review of Federal laws in this area; (3) a description of the eight operations, including a discussion of the primary defenses that would probably be asserted; and (4) the task force's prosecutive conclusions.

/The fifteen that were barred either by the statute of limitations or by a lack of any meaningful prosecutive merit will also be discussed briefly.

/A word of explanation at the outset concerning the approach of this summary is also in order.

While a summary usually recounts in a brief form the original, underlying document, the nature and breadth of this investigation made the use of that method impossible here. There were 23 different activities investigated, some of which spanned decades. In addition, there are many statutes, directives, orders, and policies - - as well as legal principles -- which had to be considered. A discussion of all of these would have required that the summary be rather lengthy. On the other hand, any effort to summarize all of these matters in a brief fashion would have done an injustice to the thoroughness of the investigation as well as an injury to the integrity of the report. For these reasons, the format of the following summary is somewhat different.

Starting with the main goal, which was to capture and recount the essence of the investigation and underlying report and to convey an understanding of the main reasons why the task force reached the basic conclusion it did - - that no prosecutions are warranted - - it was decided that a review-by-analogy approach would be the best method to employ. Thus, a couple of the more prominent authorities and pervasive activities were selected as being representative, and they were discussed in greater detail. Then, the principles and problems they presented were analogized to the remainder of the activities.

In adopting this approach, we realize that the method chosen is subject to the criticism that the wrong examples were used or something important was either not stressed or (worse yet) left out. Still, brevity, necessity, and our main goal mandated the choice made.

I

The Rockefeller Commission Report and the task force investigation revealed that at least three agencies had conducted a variety of electronic surveillances over the past thirty some odd years in the name of national security. To whatever extent they claimed the power to do so, the agencies pointed to the Office of the President as the main repository of their power, and they asserted by way of a general defense that various directives and pronouncements from that Office gave them the power to do what they did.

This position required the task force to investigate not only the agencies' activities but the authority they relied upon -- the Presidential power to authorize a NSES program and any directives, orders, or pronouncements that may have issued from that Office delegating that power. In addition, the task force had to review the two wiretap statutes 18 U.S.C. 2511 and 47 U.S.C. §605.

In order to understand the interplay among these elements, and particularly how they impact on the activity involved in this investigation, it might be helpful to review the evolution

/ The Central Intelligence Agency, the National Security Agency, and the Federal Bureau of Investigation. Because the FBI halted its participation in most, if not all, of these activities prior to the running of the statute of limitations, it was not an object of this investigation.

/ A national security electronic surveillance.

of the primary penumbra which covers whatever power exists in the area--- the Presidential power -- and then look at origin and the scope of the two wiretap statutes, especially as they relate to the exercise of the Presidential power.

A

Development of the Presidential
National Security Power

As Commander-in-Chief and as the Chief Executive responsible for coordinating the Nation's defense efforts, the President has, quite expectedly, a number of so-called national security powers. One of those is the power to authorize a NSES. Unfortunately, this power did not spring full grown from one source, such as the Constitution; rather, it started with an idea and grew steadily over the better part of four decades. As we shall see, from the day of its inception, the power was never clearly described and, more importantly, its breadth seemed at times virtually open-ended. As a result, it quite naturally spawned in the minds of some the idea that the rubric of national security ensured the legality of their actions.

* * *

The entire wiretap problem started quite by accident when a little over a century ago (1875) the Nation's first telephone

call was made. Interestingly, it may have been monitored, albeit consensually, and since then, surveillance of other telephone conversations has become a considerable problem.

Today, there are three ways under Federal law that one can legally wiretap a communication: (1) by obtaining the consent of one of the parties; (2) by obtaining court authorization; and (3) by having the Attorney General, acting for the President, authorize it as a national security surveillance. This is the type of tap involved here. Thus, the development of this national security power is helpful in understanding why the agencies did what they did, and what they would assert as a defense if their employees were prosecuted.

* * *

Partly in response to the concerns of civil libertarians that too many phone calls were being monitored, Attorney General Sargeant issued an order in 1928 prohibiting what was then known as the Bureau of Investigation from engaging in any wiretapping for any reason. Soon thereafter a new component, the Prohibition Unit, was transferred to the Department and became a new Bureau. Because the nature of its work required that the Bureau engaged in

/"Mr. Watson, come here; I want you."

wiretapping, then Attorney General Mitchell found himself facing the potential inconsistency of one Bureau being permitted to tap while the other was not. After reviewing the matter fully, ^{Attorney?} General Mitchell took the first of six significant steps toward our present policy when he decided for the first time to permit the Federal government to conduct wiretapping, albeit on a very limited scale: ^{7/} only the telephones of syndicated bootleggers could be tapped.

Within a year, General Mitchell found it necessary to expand the scope of permissible wiretapping to include "exceptional cases where the crimes are substantial and serious, the necessity is great, and [the Assistant Attorney General is] satisfied that the persons whose wires are to be tapped are of the criminal type." ^{8/}

For nine years thereafter, the Department's policy remained relatively unchanged. Then, on March 15, 1940, in response to a temporary public outcry against the practice, Attorney General Jackson reinstated the original, total prohibition against all wiretapping. His order was short-lived for two months later

^{7/} Thus, Attorney General Mitchell was the first to "authorize" wiretapping of American citizens; unfortunately, his namesake many years later, John N. Mitchell, is usually (and quite mistakenly) given that dubious honor.

^{8/} Whenever quotations are set forth, they represent the totality of the pronouncement touching on the point, so any concern in the mind of the reader with the unusual breadth and vagueness (by today's standards) is well founded.

President Roosevelt took the second (and unquestionably the most important) step when, in a memorandum to the Attorney General, he expressed his opinion that electronic surveillance would be proper where "grave matters involving the defense of the Nation" were involved. Now, the Department's wiretapping policy included, although rather cryptically, surveillance for national security purposes. -/

By now, the clouds of war began to appear on the horizon, and late in 1941 the Department's policy underwent another significant change: We began to recognize "Presidential authorization[s] for the intercepting of foreign messages and matters dealing with espionage, sabotage and subversive activities." (Emphasis supplied.) The significance of this change was doubly important: First, the source of the power was, for the first time, specifically declared to repose in the Office of the President, and second, the basis of the power -- national security -- began to sharpen in focus. Because of the significance of these changes, we should pause and review in a little more detail the recorded basis for these changes.

/ Along with announcing the newly discovered power, the President also implied that it reposed in his Office by transferring it to the Attorney General and saying he was authorized to approve "listening devices [directed at] persons suspected of subversive activities . . . including suspected spies."

The new description of the President's power was contained in a memorandum from Director Hoover to the Attorney General, in addition to which he said: "The President indicated [to the Director] that as Commander in Chief of the army and navy, under the National Emergency, he believed that he had the authority to authorize such [surveillances]." Then, curiously, the Director questioned the President's decision by suggesting that it would be "highly desirable that some definite decisions be made by the Department of Justice relative to the legality of the [wiretapping activity]."

As a result of that request, Solicitor General Fahy was directed to look into the matter, after doing so he concluded that surveillance could be conducted where the matter "affected the national security." Based in part on this recommendation, Attorney General Biddle concluded that certain surveillances he had previously authorized the Bureau to conduct would be permitted to continue if "they have developed evidence of

/ Perhaps the suggestion was not really unusual in light of Director Hoover's strong dislike for wiretapping.

sabotage, espionage or activities undertaken for the purposes of injuring the national defense." Two months later, the Nation went to war; and for the next five years, no significant change occurred.

At the conclusion of the war, Attorney General Clark reminded President Truman in a letter of President Roosevelt's initial authorization in 1940, and stated that it was his, Clark's, view that wiretapping should be permitted to continue in light of "an increase of subversive activity . . . a very substantial increase in crime . . . [and] cases vitally affecting the domestic security, or where human life is in jeopardy." Although no definitive explanation or justification accompanied the report, President Truman concurred with Clark's suggested modifications.

By the early 50's the scope of NSES activity stabilized. Still, although there was no major change being contemplated, a very important idea that was later to have a profound impact on the Nation in the Director's public suggestion that national security surveillances be conducted

/ Wiretapping was then being restricted to major crimes where the life of the victim might be at stake "and to investigations essential to the national security involving such crimes as espionage and sabotage."

solely for intelligence gathering purposes, rather than for gathering evidence for a trial.

Although it is not entirely clear why, it seems this intelligence gathering rationale was developed during this period in an effort to reconcile the Department's wiretapping policy with a troublesome proscription in what was then the only wiretap statute. —

Under §605, , it was illegal to intercept and divulge the contents of a wire or radio communication. Thus, the results could not be used at trial. But there was a problem. The past descriptions of the national security power said it could be exercised to gather information about espionage, sabotage and the like, all of which are crimes. If the evidence could not be used at trial, what was the reason for gathering it? The only answer was, of course, the one Director Hoover mentioned -- intelligence purposes.

The first time Director Hoover mentioned the idea, he said: "the first consideration in any intelligence operation is that of acquiring information to enable the Executive branch of the government [1] to take preventive measures against outbreaks

— / 47 U.S.C. §605, discussed infra.

of violence or [2] to control espionage on the part of subversives."—/

Two years later, the Director said: "The FBI has an intelligence function in connection with internal security matters equally as important as the duty of developing evidence [F]or the FBI to fulfil its important intelligence function, considerations of internal security and the national safety are paramount and, therefore, may compel the unrestricted use—/[of such surveillances]. (Emphasis supplied.)

During this period in which Director Hoover was claiming "unrestricted use," NSA was created. Its "enabling statute" which was really not a statute but a Presidential Directive (called NSCID #9),—/ contained the following provisions:

—/Later, as we shall discuss, these two bases were to be expanded, included in a new wiretap statute (18 U.S.C. §2511(3)) and become known generally as domestic and foreign intelligence surveillance.

—/There is no recorded disclaimer of this idea in the Department's records.

—/These will be discussed in more detail later.

The special nature of [NSES] activities requires that they be treated in all respects as being outside the framework of other or general intelligence activities. Orders, directives, policies, or recommendations of any authority of the Executive branch relating to the collection * * * shall not be applicable to [such] activities, unless specifically so stated and issued by competent departmental or agency authority represented on the Board. Other National Security Council Intelligence Directives to the Director of Central Intelligence and related implementing directives issued by the Director of Central Intelligence shall be construed as non-applicable to [such activities, unless the National Security Council has made its directive specifically applicable to COMINT.

Thus, NSA was born in a period of "unrestricted use" and its birth certificate (which was, by the way, top secret) said it did not have to follow the limitations in the NSES area that limited other agencies unless it was expressly directed to do so.

For the next decade, the intelligence-gathering idea simmered, until President Johnson issued an Order making the next significant change in the Department's policy.

On June 30, 1965, he sent a memorandum to all Executive Departments and agencies severely limiting electronic

During this period Attorney General Kennedy directed that existing wiretapping procedures and practices "are continued in force."

surveillance by the Executive Branch in the future. However, after stating that surveillance "may sometimes be essential in protecting our national security," he expressly directed that this type of surveillance was not prohibited by the order, but rather limited its use solely to cases in which the national security is at stake."/

Two years later, on June 16, 1967, Attorney General Clark issued a similar memorandum, but he too expressly excluded its limitations from applying to "investigations directly related to the protection of the national security." /

By now, the pressure for a new wiretap statute forced Congress to act, and it precipitated the fifth major change in the Department's policy when it passed a new wiretapping law 18 U.S.C. §250, et seq. (Title III of the Omnibus Crime Control and Safe Streets Act of 1968.)

The only existing wiretap statute prior to that time was 47 U.S.C. §605, and for a number of years after that Act was passed, / the Department had repeatedly sought (and invited) legislation from Congress which would both permit wiretapping and allow the use of the results or fruits of such surveillance at trial, but Congress, however, declined to act. By 1967,

/ Nothing was said about NSA.

/ Ibid.

/ 1934.

though, a consensus was gradually reached in Congress that additional legislation was necessary; and as a result, it enacted Title III.

Although the new Act established procedures whereby a warrant could be obtained for conducting certain kinds of electronic surveillance, our concern here is limited primarily to one Section, §2511(3). Because this part of the new statute will be discussed in greater detail later, it will not be recounted verbatim here now, but it is important to point out for now that that Section expressly exempted the President's power from the coverage of the provisions of Title III.

Late in the fall of 1970, the Supreme Court forced the last major change when it held that in the Keith case that the President did not have any power to authorize a NSES for domestic purposes. / Of course, its decision three years earlier in Katz v. United States, 389 U.S. 347, in which it held that all wiretapping was subject to fourth amendment limitations, was a factor, both in the enactment of Title III and in its approach to later cases. Keith, however, has a more direct relationship to the Commission's investigation and this report.

/ United States v. Sinclair, 321 F. Supp. 1074 (E.D. Mich. 1971), petition for mandamus denied sub. nom. United States v. United States District Court for the Eastern District of Michigan, Southern Division, the Honorable Damon J. Keith, 444 F. 2d 651 (6th Cir. 1971), aff'd, 407 U.S. 297 (1972).

This, then, is how the Presidential power to authorize an NSES came about, — and as we have seen, it was expressly exercised in at least one way — by giving the Attorney General the power to permit the Bureau to engage in NSES activity.

It was also exercised in another important way — by directives and orders, the President, gave two members of the intelligence community the power to conduct certain NSES programs. Thus, a brief(er) review of those are in order.

There have been other equally significant changes in the power since Keith, especially its description and guidelines, but our concern here is limited to the scope of the power as it existed when the acts discussed herein were committed.

B.

Sources of Authority Other Than The Presidential Power

While no specific authorization or exemption permitted some of the CIA and NSA intelligence activities involving interceptions of communications otherwise proscribed by §2511 and /or §605, a number of factors -- in addition to the Presidential national security power -- suggest that the Agencies were reasonable in believing these activities to have been lawful. Included are the historical purposes of, and subsequent directives given to, the Agencies; the interrelation between their national security function and the criminal justice function of the other federal agencies with whom they worked; the broad powers conferred upon them by statute; and the express or implied approval given by various officials.

The National Security Council and the CIA were established pursuant to the National Security Act of 1947, 50 U.S.C. §401, et seq.. Under that Act, NSC's primary function is to advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security so as to enable the military services and the other departments and agencies of the government to cooperate more effectively in matters involving the national security. 50 U.S.C. §402. Its membership includes, among others, the President, the Vice President, and the Secretaries of State and Defense.

Under NSC is the CIA and its head, the Director of Central Intelligence (DCI). In carrying out its responsibility of "coordinating the intelligence activities of the several Government departments and agencies in the interest of "national security," the Agency's duties are (1) "to advise the National Security Council in matters concerning . . intelligence activities of the Government ..."; (2) "to make recommendations to the National Security Council for the coordination of . . . intelligence activities of the department and agencies..."; (3) "to correlate and evaluate intelligence relating to the national security, and provide for the appropriate dissemination of such intelligence ..."; (4) "to perform, for the benefit of the existing intelligence agencies, such additional services of common concern as the National Security Council determines can be more efficiently accomplished centrally." and (5) "to perform such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct." 50 U.S.C. §403(d).

The National Security Agency was established by Presidential directive in 1952, and placed under the authority and control of the Secretary of Defense. The primary function of NSA is to engage in communications intelligence activities; i.e., the gathering of intelligence information by other than the intended recipients.

Directions to CIA and NSA are implemented via National Security Council Intelligence Directive (NSCIDs). Since the President has the only "vote" on the Council, its NSCIDs are deemed by both CIA and NSA to bear his imprimatur.

The NSCID primarily applicable to CIA, NSCID 1, directs the DCI to establish comprehensive national intelligence objectives generally applicable to foreign countries, to coordinate all foreign intelligence activities, to see that such intelligence is disseminated to various executive agencies, and to ensure that on matters affecting national security the intelligence community is fully supported by all knowledge and technical talent available to the Government.

The 1972 revision of NSCID 1 reiterated all these functions, and made clear that the production of intelligence required by "the President and other national consumers" was of the highest priority. This revision implemented a November 1971, memorandum from President Nixon, the objective of which was to establish overall goals for the intelligence community and to provide more efficient use of resources by these agencies in collecting intelligence. In 1974, President Ford reaffirmed these goals in a memorandum to the DCI, noting his expectation that the heads of the departments having foreign intelligence responsibilities would cooperate fully and provide the DCI with all possible assistance.

CIA also finds support for its intelligence gathering activities from NSCID 5, which, since 1958, has delegated primary responsibility to the CIA for clandestine activities abroad "in order to meet the needs of all departments and agencies concerned in connection with the national security." This authorization, along with the CIA's more general power under §403(d)(4) to "perform ... such additional services of common concern as the National Security Council determines can be more effectively accomplished centrally" explains the Agency's view that such actions were authorized.-/

In a similar fashion, NSA draws support for its activities from NSCID 6, which has provided, at least since 1958, for NSA to provide "signal intelligence" for all intelligence agencies. "Signal intelligence" as defined therein, is intelligence produced by the study of foreign communications. To implement this NSCID, and to insure that it is involved only in "foreign" communications, NSA's long-standing policy has been to intercept a communication only if it has at least one-terminal outside the United States.

/It should also be reiterated that NSCID9 exempted CIA and NSA from restrictions publicly placed upon intelligence activities.

NSA also notes that NSCID 6 has provided, since 1958, that the departments and agencies being served are responsible for informing the NSA Director of the information desired. NSA interprets this language to require the implicit assurance by the agency seeking intelligence that the request is appropriate. Hence the responsibility is on the requesting agencies to frame their requests in accordance with the law. In 1973, Department of Defense General Counsel approved this interpretation, and stated that NSA was operating within the law.

Finally, NSA files reflect that since 1962 the Justice Department has sent hundreds of names of racketeers to NSA, requesting any information it might have concerning them. This too indicates that the Department did not regard this dissemination unlawful.

In reviewing these justifications, it must be remembered that some sources of authorization were after the fact, that others could not legally be relied upon, and, most important, that 50 U.S.C. 403(d) (3) expressly provides that the CIA shall have "no police, subpoena, law-enforcement powers, or internal security functions." Nonetheless, it appears from a number of authorities that no one really was clear on precisely what the Agencies could and could not do, that they were encouraged to become involved in law enforcement activities, and that no one, at least in any direct fashion,

ever seriously warned them that their actions were contrary to law. Thus, it seems harsh to charge either CIA or NSA employees with the responsibility of foreseeing the legal limits of their activities.

We will now turn to a discussion of the federal statutes which regulate the interception of communications.

C

Wiretap Statutes

Section 605 and Title III were premised on a few basic yet important principles which should be kept in mind when reviewing the statutes.

The basic purpose for enacting §605 in 1934 was to protect the integrity or the privacy of the Nation's communication's systems. In an effort to reach that goal, the statute regulated the conduct of personnel who worked for communications companies, and anyone else who might attempt to invade the integrity of such systems without proper authority.

Unfortunately the framers of the legislation fell somewhat short of their goal. They required, for example, that, before a violation could be shown, there must be both an interception and a divulgence of a communication, rather than a mere interception. This additional requirement allowed much wiretapping to slip through the crack. And, to the extent the drafters intended §605 to cover all electronic communications or electronic interceptions, they failed for Section 605 is, by its terms, limited to wire and radio communications, thereby exempting a host of esoteric communication techniques which would be developed in later years; e.g., laser and micro-wave communications.

Thirty-four years later, Congress enacted another wiretap statute; it too, however, had some important gaps.

The new statute, Title III, overlapped its predecessor by taking over the regulating of wire communications, but it also expanded the coverage to a new area: oral communications. Still, like §605, there were some noticeable gaps. First, the statute does not cover communications transmitted purely by radio; therefore, such communications require the "divulgence" element of §605. In addition, the new statute is limited to aural acquisitions (through the sense of hearing), thereby eliminating from its coverage many other surveillance techniques. As mentioned earlier, though, the most important aspect of Title III is that it exempted from its coverage, as well as from §605, the President's power to authorize NSES.

With this as background, we turn first to a review of the specific statutory prohibition of §605 and Title III; then we will look at the Presidential power "exemption."

* * *

The stark contrast between the simplicity of the descriptions of the President's NSES power and the

E.g., silent messages sent by electrical impulses, rather than by a voice which can be heard.

complex scope of §605 should, standing alone, prompt some sympathy for fledgling agencies created -- as were CIA in 1948 and NSA in 1952 -- in the midst of this development and then charged with the very serious task of gathering adequate intelligence to protect the Nation's security. An analysis of the 1934 Act quickly reveals why.

One of the earliest courts to analyze §605, Sablowsky v. United States, 101 F. 2d 183 (3rd Cir. 1938), started by noting that §605 has four major clauses. The first provides in essence that:

No person receiving or transmitting any communication shall divulge the contents [improperly].

Sablowsky held that this referred to a communications company employee and prohibited him from divulging something he had

Each clause has many phrases and words we will ignore for our purposes here, for they are often synonyms which the drafters hoped would make sure that no unintentional gaps were left. For example, when referring to a communication, the Act refers to its "existence, contents, substance, purport, effect or meaning." We have selected one -- contents -- to represent the group. Also, for this part of the discussion, we will review §605 as it existed prior to the 1968 Act.

received lawfully. (A major part of the task force's investigation involved telegraph and telephone company personnel who had helped various agencies to intercept and receive many private communications.)

The third clause, which, like the first, involves receivers, prohibits someone not entitled to receive a communication from doing so (e.g., by means of an extension phone or by having a communications company employee assigned to a "non-receiving job provide a copy of a message) if its use will be for the benefit of himself or someone else. The unique aspect of this clause, as contrasted with the first, is that it is not illegal merely to divulge it; rather it must be used for some benefit.

By received, we mean obtained by a person and by a method in a way the sender or receiver would expect. This we contrast with the term "intercepted," which is the unexpected obtaining of a communication between a sender and receiver. See, e.g., Reitmeister v. Reitmeister, 162 F. 2d 691 (2nd Cir. 1947).

The interception forbidden by Section 605 of the Communications Act of 1934, 47 U.S.C.A. §605, must be by some mechanical interpositions in the transmitting apparatus itself, that is the interjection of an independent receiving device between the lips of the sender and the ear of the receiver.

But, cf., United States v. Sullivan, 116 F. Supp. 480 (D.D.C. 1953) and United States v. Polakoff, 112 F. 2d 888 (2nd Cir. 1940), certiorari denied, 311 U.S. 653 (1940), holding that the means employed to accomplish the interception is irrelevant.

The second clause says that:

. . . no person not being authorized
by the sender shall intercept any
communication and divulge the contents
of such intercepted communication to any
person; . . .

The important distinction between this clause and the first and third, is that it involves intercepting, rather than receiving. And, it refers to "any communication," rather than to "interstate or foreign communication by wire or radio." To date, no court has held that the second clause has a narrower scope than the first and third; rather, Sablowsky, supra, and Weiss v. United States, 308 U.S. 321 (1939) seem to indicate that the term "any communication" not only includes interstate and foreign communications, but also includes intrastate communications. Thus, to this extent, the second clause includes the scope of the first and third and, in addition, it seems to prohibit the interception of other communications. Tracking the first-third-clause-procedure, the fourth clause covers what the second did not -- those who acquire an intercepted message:

Unlike the rather extensive legislative history of Title III, the complete legislative history for §605 says:

Section 605, prohibiting unauthorized publication of communications, is based upon section 27 of the Radio Act and extends it to wire communications.

Thus, there is no definition of the term "any communication," thereby inviting some confusion.

. . . no person having received such intercepted communication shall divulge or publish the contents or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: * * *.

Some of the less-obvious "gaps" in the statute now begin to emerge. While under clauses one and two, neither the lawful receiver nor the unauthorized interceptor is expressly barred from using the message for his or another's benefit, the unauthorized receiver has an "escape" under clause three for he can divulge it so long as there is no benefit derived. The fourth clause is comparatively "tighter", for one who acquires an unauthorized interception cannot do anything with it. Finally, there is a problem as to what the term "use" means., but a discussion of that will be deferred until later, when potential defenses are discussed.

If all of this seems to give rise to some confusion, the 1968 Act added still more.

* * *

On June 19, 1968, §605 was amended in conjunction with the enactment of Title III, 18 U.S.C. §2510, et seq.

In order to understand the scope of Title III, it would be helpful to establish a few definitional "guideposts." The statute covers wire and oral communications; wire communication is defined as:

any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications (Emphasis supplied).

On first reading this would seem to suggest that the system the Act protects is a point-to-point wire system, i.e., a telegraph or telephone wire. The problem with this interpretation though, is that it is much too primitive in light of techniques now available and in light of the make-up of our Nation's communication system.

That system could be characterized as one which is contiguous, switched (e.g., from wire to cable to microwave), automatic, and self-routing. Its "wireless" components include a multi-channel microwave carriers system capable of carrying up to 2,000 communications on some channels. International commercial radio-telephone communications can be transmitted by high-frequency, single or multi-channel

telephony which enters the national communications network through what are known as "gateways." (This is a means to pass from one system to another). As we will discuss, high-frequency telephony is considerably more susceptible to interception by comparatively unsophisticated equipment, such as ship-to-shore radio or the ordinary Zenith transoceanic-type portable radio than other systems.

Microwave transmissions are also used, usually in a "straight line". They can cover much higher frequencies than "high frequency telephony" which follows the curvature of the earth. Thus, it has been estimated that the radio portion of a high frequency single-channel radio-telephone communication from Montevideo, Uruguay, to New York City, could be intercepted with relatively unsophisticated radio receivers over an area of perhaps 30 percent of the earth's surface, and high frequency multi-channel transmissions may also be dechanneled by "homemade" amateur equipment. (Indeed, an index of the users of international radio frequencies is reportedly published by the FCC and may be obtained from the Government Printing Office.)

Though the term "wire communication" as used in the statute would include these systems, we believe it is limited to communications passing through our Nation's communications network. (Both case law and the legislative history seem to suggest that 2510 et seq. have no extra-territorial application where a "foreign" communication system is used.)

The second definition of importance is "oral communication" which is defined as:

any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.

Once again, while wire communications are covered regardless of whether any expectation of privacy exists, only those oral communications uttered under circumstances justifying a reasonable expectation of privacy are protected. An example of the problem one encounters in applying these two is set forth in United States v. Hall, 488 F. 2d 193 (9th Cir. 1973).

Early in 1971, a Tucson housewife was listening to a high-band receiver and overheard two men talking on radio telephones in their cars. (This type of radio is not unique; it is sold on the open market to the general public to permit them to listen to police and fire broadcasts. On these same frequencies radio telephone communications are broadcast.) After listening for a period of time she became suspicious and reported the conversations to State authorities who also monitored the conversations. As a result, the defendants were arrested and convicted for possession drugs. (footnote continued on page 25)

Having specified the types of communications (wire and oral) to be protected, Title III defined the term interception:

the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

There are two important elements here (1) "aural" and (2) "through the use of a device."

Although the word "aural" is not defined in the statute, the legislative history discusses it specifically and says it excludes all other means of acquisition:

(footnote continued from page 24)

Although the appellate court held that Title III did not protect communications between two mobile radio telephones, because they were oral communications uttered with no reasonable expectation of privacy, the court went on to hold they would not reach the same result where a radio telephone called a regular telephone, because that would have been a case where the latter instrument involved a wire communication, and that is protected without qualification as to an expectation of privacy. This result was accurately described by the court when it said, "We realize that our classification of a conversation between a mobile and a land-line telephone as a wire communication produces what appears to be an absurd result." Then, the court went on to compound the problem when it said that:

. . . any citizen who listens to a mobile telephone band does so at its own risk, and scores of mariners who listen to the ship-to-shore frequency, commonly used to call to a land-line telephone, commit criminal acts.

Another "gap" problem is that Title III does not cover the "receiving" of a wire communication, as do clauses one and three of §605.

Paragraph (4) defines "intercept" to include the aural acquisition of the contents of any wire or oral communication by any electric, mechanical, or other device. Other forms of surveillance are not within the proposed legislation. See Lee v. United States, 47 S. Ct. 746, 274 U.S. 559 (1927); Corngold v. United States, 367 F. 2d (9th 1966). An examination of telephone company records by law enforcement agents in the regular course of their duties would be lawful because it would not be an "interception". (United States v. Russo, 250 F. Supp. 55 (E.D. Pa. 1966)). The proposed legislation is not designed to prevent the tracing of phone calls. The use of a "pen register", for example, would be permissible. But see United States v. Dote, 371 F. 2d 176 (7th 1966).

1968 U.S. Code and Adm. News at 2178. This is of more than passing significance, for it seems to exclude from the statute's coverage all communications transmitted mechanically, i.e., transmitted by signals independent of sound, for example, by electrical pulse.

The phrase "acquisition through the use of any . . . device" is another important limitation, for it makes it clear that the congressional concern was with the activity engaged in at the time of the communication which causes the communication to be overheard by uninvited listeners; that is, the contemporaneous surveillance (by hearing, recording, or otherwise) was at the center of congressional concern. See, e.g., United States v. Turk, 526 F. 2d 654, 658-659 (5th Cir. 1976).

With these aside, we can turn now to a brief look at the proscriptions of Title III. They are, in essence, as follows:

(1) . . . [A]ny person who

- (a) willfully intercepts, endeavors to intercept, or procures any other person to intercept . . . any wire or oral communication. . . .

* * *

- (b) willfully discloses, or endeavors to disclose, to any other person the contents or any wire or oral communication, knowing or having reason to know that the information was obtained through the interception or a wire or oral communication. . . .

- (c) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication. . . .

shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

Title III is, in a phrase, an "interception-disclosure-use" statute. But, perhaps the most important aspect of the Act is the exemption to both statutes which it provides in §2511(3):

Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign

intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government.

We are now ready to review the activities which were investigated, and some of the central questions we will be focusing on in the rest of the summary will be (1) does the activity under investigation come within a prohibition listed in the statutes (2) and if so, is it exempted by §2511(3). And, even though the exception was not spelled out until 1968, we will also be considering such prosecutive problems and potential defenses as lack of intent or good faith reliance on prior history, the lack of any definitive guidance, and reassurances of legality by high government officials.

 As was indicated earlier, this was an expansion of Director Hoover's descriptions many years earlier; and, in 1970 the Supreme Court held, in Keith, that the President did not have the power described in the second (last) sentence of this section.

II

7

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

A

"Major Operations"

A number of the activities the task force investigated involved programs which spanned many years and which tended to ebb and flow over the period. And, more often than not, the program lacked a specific directive, order, or statutory basis; instead, its authority was a combination of elements. For our purposes here, we will select one such program (perhaps the most pervasive), trace its development, and then explain why a prosecution would be inappropriate. We believe the same principals which dictated that conclusion apply as well to the other programs which will be discussed, but much more briefly.

"SHAMROCK" was one of the most pervasive programs the task force discovered, spanning over 30 years; like so many things that grow to massive proportions, however, "SHAMROCK" started very innocently.

(footnote continued from page)

In addition to these, the task force discovered a second category of activity, which, though questionable, was non-prosecutable. For example, NSA and CIA engaged in a number of support activities which helped wiretapping programs. They obtained telephone toll records, [REDACTED] supplied the D.C. Police Department and the Secret Service with wiretapping equipment, supplied an office to assist in a program to review domestic telegram traffic, and recruited agents and introduced others to them (agency representatives and personnel provided to assist their communication carriers). All of these activities, while relating to other various wiretapping programs, did not themselves involve intercepting communications; thus, they clearly did not violate the wiretap statutes.

Faced with the ever-increasing threats posed by Japan and Germany, Director Hoover started working with the Department on a proposed executive order to permit the program, but before the Order could be finalized, Pearl Harbor intervened.

Congress, acting with uncharacteristic swiftness, enacted what was later to be called the Censorship law, and on December 22, 1941, the Solicitor General told the Bureau that the proposed Executive Order would no longer be necessary, for the newly created Office of Censorship would have full authority over international communications, and the FBI could obtain any that it needed from that Office in the future.

While all this was occurring, though, the Bureau was moving ahead. Very soon after December 7, the Bureau was requested by the State Department to ask the appropriate cable companies to hold up the transmissions of messages to certain countries for 24 hours, and then to make copies of the cables available for review. The requests were made and surprisingly, yet understandably, the companies readily agreed. The Attorney General was promptly advised, thereby putting the Department on notice the program had begun.

/cont'd
cooperate, but this time they did so expressly on the ground that they felt they were prohibited by law from doing so and would be subject to possible prosecution if they complied! As we shall see, this was a continuing concern of the companies and, unfortunately, their initial instincts would, many years later, prove to be correct.

Thus, "SHAMROCK" was born, although it was not known by that name then, its initial authority was a mixture of Director Hoover's initiative coupled with a State Department request and the enactment of a Censorship Office. The nose of the camel had entered the tent.

Very soon thereafter, the Censorship Office started having copies of certain cable communications forwarded to the national headquarters in Washington, and arrangements were made with the Bureau that copies of those which might be of possible national defense interest would be forwarded to the FBI where appropriate.

During the next five years, the Bureau encountered a number of difficulties trying to obtain certain cable copies from a few military components which had started to engage in a similar program, so the Bureau started its own program. By the fall of 1946, it was obtaining copies of the cable traffic of some thirteen countries directly from the cable companies.

Although the tent now had a number of occupants, including the Bureau, it was soon to come down for, when the war ended, the need for an Office of Censorship also came to an end. Unfortunately, Congress, in repealing the Censorship Act in 1947, also repealed what may have been the only legal basis for the cable collection program then in existence.

Once again, as in 1940, the cable companies' survival instincts were aroused, but this time they were in a different position: they were already supplying the cable copies. Nevertheless, their concern soon mounted, prompting them to seek assurances that the "federal government [could] guarantee to (sic) commercial communication companies against criminal liabilities resulting from these companies furnishing to the Army certain documents and traffic."

Twice -- in 1947 and again in 1949 -- the companies were given the assurances they sought. Of more than passing interest, though, was something else than Secretary Forrestal said to a group of executives of IT&T and RCA:

. . . while it was always difficult for any member of the Government to attempt to commit his successor, he could assure the gentlemen present that if the present practices were continued the Government would take whatever steps were possible to see to it that the companies involved would be protected.

For some unexplained reason, no mention was made of the companies' practice of supplying copies to the Bureau.

Initially, Secretary of Defense Forrestal told the group he was speaking for President Truman in commending them for their cooperation and requesting their continued assistance because the intelligence constituted a matter of great importance to the national security. Two years later, on May 18, 1949, Secretary of Defense Johnson met with officials of the same companies and stated that President Truman, Attorney General Tom Clark, and he endorsed the Forrestal statement and would provide them with a guarantee against any criminal action which might arise from their assistance. Former Secretary of Defense Laird, as late as 1973 when the program was halted, said "SHAMROCK" was also tacitly endorsed by him.

He also said that, so long as the present Attorney General was in office, he could give assurances that the Department of Justice would also do all in its power to give the companies full protection. In an effort to clarify this latter point, a company official inquired if Mr. Forrestal was speaking not only for the Office of the Secretary of Defense, but also in the name of the President of the United States. Mr. Forrestal replied that that was correct.

Two years later, essentially the same representations were made, however, the memorandum reflecting that fact had an interesting pair of handwritten notes, one saying, "OK'd. by the President and Tom Clark," and signed by Louis Johnson, and the other initialed as approved, "T.C.C.," presumably meaning then Attorney General Tom Clark.

Though Congress repealed the Censorship law, it recognized the need of the President to get advice in certain domestic, foreign, and military areas, particularly as they relate to national security matters, so in response to that need, Congress enacted a law which established the National Security Council (NSC). Five years later, in 1952, the President signed a directive which created the National Security Agency; the functions assigned to it included responsibility for "SHAMROCK".

For the better part of the next two decades, the Bureau worked closely with the newly-created Agency, becoming a regular courier between the Agency and the companies for the purpose of picking up cable traffic. Then, for reasons not of moment here, the Bureau withdrew its participation in the program in 1973, and in May of 1975, "SHAMROCK" was halted entirely when the Agency also stopped the practice.

When NSA first assumed responsibility for the "SHAMROCK" operation in 1952, the practice and the procedures had already been established for more than a decade. Those procedures permitted NSA employees access to all diplomatic messages handled by the RCA, ITT, and Western Union offices located in New York City and Washington, D. C., as well as the RCA and ITT offices in San Francisco. RCA provided NSA employees with duplicates (drop copies) of all international messages, thus requiring NSA employees to visually screen and select out diplomatic messages for microfilming on NSA-owned machines located on the RCA premises. Western Union and ITT (starting in 1953), went further, providing NSA agents with a daily microfilm of diplomatic messages which had already been selected out and photographed by company employees on NSA-owned photo machines. The investigation also shows that NSA employees were given access to all perforated paper tape copies of international messages transmitted by RCA and possibly from ITT.

[REDACTED]

NSA started to select out other international messages containing the names of persons on what was called the watch lists.

Statutes

Though it would seem that the companies, the FBI, and NSA violated clauses one and three of §605, there are a number of problems with trying to prosecute anyone for this activity, including the following possible defenses:

- (1) Prior Presidents and Attorneys General had notice of and, in at least one case, appeared to approve the operation;
- (2) Two Secretaries of Defense had tried to give the companies immunity;
- (3) Clause one of §605 permits companies to disclose information "upon demand of lawful authority;"

— This was a list of names maintained by NSA for other investigative agencies of persons about whom the agencies wanted investigative information, usually for domestic security reasons. This use of this list continued until 1973 when Attorney General Richardson terminated the practice.

— Title III does not apply for the collection method was non-aural -- copies of telegrams and magnetic tapes containing electrical impulses. Accord, Smith v. Nunker, 356 F. Supp. 44 (D.C. Ohio, 1972)

— A few years ago, a United States attorney asked the Department what that exemption encompassed, and in reply we said the term "embraces any state or federal agency authorized by state or federal law to demand, by subpoena or otherwise, the production of books, records, papers, or other documents," (Emphasis supplied.) While the statute speaks in terms of a "demand," the requests to the companies here were, at most, patriotic pleas plus parting (footnote continued)

- (4) There was no divulgence outside the Executive Branch, so there was no divulgence within the meaning of §605;
- (5) A use which benefits the Government is not the type of "use" contemplated by the statute;
- (6) It is not illegal to "ask" a company to give out copies of cables. If the company complies, it may be violating the statute but the recipient would not; and
- (7) The putative defendants acted in good faith, and they lacked the necessary intent to prove a violation of the law.

In addition to these problems, there are a number of other reasons which militate against prosecution.

First, as is clear from a review of a evolution of the President's power from its inception, the true scope of the President's power (with which the Bureau and the Agency were familar) was unknown. And although by today's standards the power was virtually open ended, "SHAMROCK" would have fitted quite easily, then within its parameters, especially in 1941 when the program started. That, coupled with the notice to the Attorney General could lead one to believe he had accepted it under the President's NSES power.

/(footnote cont'd)
promises of protection. Still there is a question whether the agencies could be said to come within the demand part; moreover, this defense could only be advanced by the companies, not the Agencies.

Second, it would be singularly unfair to carve out for prosecution those who carried out the program the last three years it was in existence when they had no reason to question the legality of a program that had gone on for 30 years.

Third, although it is not directly controlling here, the directive which created NSA and gave it certain powers to collect information expressly provided that because of the special nature of their work, prohibitions contained in "orders, directives, policies. . . of the Executive Branch relating to the collection . . . of intelligence . . . shall not be applicable to [such] activities, unless specifically so stated. . . ." Thus, agency employees could very easily have concluded that if there was a prohibition to the program, it did not apply to them (Throughout all of this, it is also important to keep in mind that the potential defendants are all laymen and, as we have seen, the law in this area is complex.)

Fourth, Congress, by funding this program, undoubtedly had some understanding of its existence. We also know that various Presidents and cabinet officers knew of the program but did nothing to halt it, thereby permitting agency personnel to believe it had Executive approval.

Fifth assuming it could be shown that a President impliedly authorized the program, and assuming he had the power to do so, Section 2511(3) would exempt the program from either wiretap statute coverage. Finally, even if the statute (§605) applies all of these reasons indicate the potential defendants acted in good faith sufficient to negate the criminal intent.

For all of these reasons, the task force recommends against prosecution of power and agency personnel for operation "SHAMROCK"

As noted earlier, other programs will be discussed briefly. While each employed different means of surveillance, presenting different problems under §605 and/or §2511, they share many common defenses. More important, the basic question involved -- whether it is just to prosecute individuals for these activities -- remains the same.

* * *

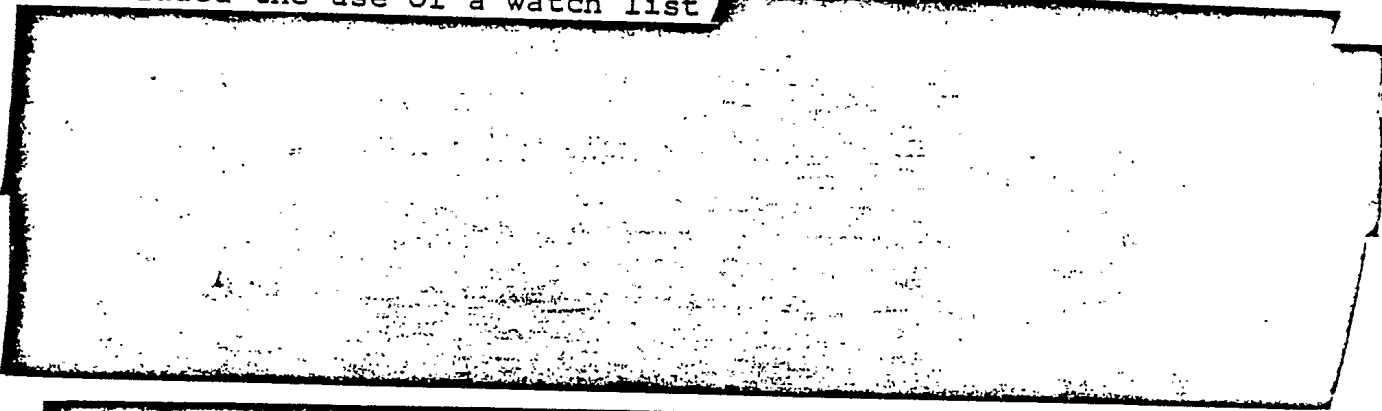
NSA had two other programs that fall within the "Major Operation" group -- MINERET and [REDACTED]

MINERET was started in July of 1969, and it formalized the agency's practice of collecting information for the Secret Service and the FBI about people in whom they had an interest. (e.g., civil disturbance and national security information).

MINERET gathered intelligence from a variety of communication programs involving both aural and non-aural communications. Some

of the input for this program came from operation "SHAMROCK",⁷ but other than that, the MINERET input came from communications that had at least one terminal in a foreign country. (The interceptions occurred both from within and without the United States.)

In mid-1970, MINERET was enlarged to include checking to see if any intelligence concerning narcotic trafficking was picked up incidentally as a by-product of its work. Later, it included the use of a watch list



The task force recommends against prosecution for a number of reasons.

First, the Attorney General decided in 1971 that electronic surveillance to obtain intelligence concerning potential domestic violence was within the President's national security

power. Second, as late as November of 1975, the Attorney General suggested to the Senate Select Committee that it was arguable there was no reason for people to expect privacy if their communications are transmitted by radio; therefore, the Fourth Amendment would not apply. (This conclusion would include the wiretap statutes as well.) These positions would undoubtedly be asserted as a defense to any prosecution. In addition, there is the problem of the TOP SECRET order concerning NSA mentioned earlier, and which suggested they were not under the same prohibitions as other members of the community. On that point, the Senate Select Committee concluded in a recent report that there were no existing statutes which controlled, limited, or defined the intelligence activities of the NSA; that no statute or executive order prohibits NSA from monitoring a telephone circuit with one terminal in the United States; and that there is no statute which prohibits the watch list program.

So, as with "SHAMROCK" an argument could be made that MINERET ~~_____~~ violated at least one if not both of the wiretap statutes; however, any prosecution would have to overcome all of these problems, and the prospects of that seem very slim. For these reasons, the task force recommends against prosecution of any agency personnel for MINERET ~~_____~~ activities.

* * *

The final "major operation" involves a program first named NARCOG.

In October 1969 the President, deeply concerned with a number of serious problems arising from international narcotics traffic, established the White House Task Force on Heroin Suppression, and CIA was directed by the President to provide the task force with assistance. [A CIA office of Narcotics Coordinator was established (and later reorganized under the name of NARCOG) to provide representation of CIA on the working group, liaison with other agencies, and intelligence reports and studies concerning the principal areas of task force concern [REDACTED]

In August 1971, the President up-graded the priority of the program by replacing the task force with a Cabinet Committee on International Narcotics Control (CCINC). The CIA Coordinator was named chairman of a subcommittee, and it continued to provide BNDD (also a member of the Intelligence Subcommittee) with foreign narcotics intelligence.

The information gathered by CIA was obtained primarily as the result of incidental surveillance by NSA (e.g., MINERET [REDACTED] and then a review to see if any by-product of the NSES activity involved drugs. In addition, CIA engaged in other overseas interceptions specifically conducted to gather international narcotics intelligence.

[When overseas CIA stations inadvertently acquired information concerning the narcotics trafficking activities of U.S. citizens as the result of electronic surveillance, the local CIA official would reportedly surrender the information to his local BNDD counterpart and take steps to insure that no further collection on the U.S. citizen occurred.]

The task force believes a prosecution for NARCOG would be inappropriate in light of the problems which arise because of the implied Presidential authorization which caused the activities to start. In addition, neither NSA nor CIA conducted any specific surveillance of American citizens specifically to meet its responsibility under NARCOG; the only information supplied was information gathered from intelligence collected for other purposes; in short, it was by-product information. [(To whatever extent CIA wiretapped, it was (with one exception discussed next) done totally outside the country, and it did not involve this Nation's communication system, and therefore it did not violate the wiretap statutes.)] For these reasons, the task force recommends against prosecution.

"Minor Operations"

~~_____~~ Iran for a four month period during 1972-73 during which the CIA intercepted (by radio) certain radio

telephone communications between this country and Latin 7
America (the surveillance was directed against a foreign
target) for the purposes of gathering narcotics information.
The interceptions occurred within this country.

There are, as we discussed earlier, a number of directives
authorizing CIA to gather intelligence information and those,
coupled with the President's insistence that the agency
contribute to the maximum extent possible and "mobilize its
full resources to fight the international drug trade."
could be construed by some to be tantamount to Presidential
authorization under §2511(3). In addition, it was during this
time that the President considered narcotics control a matter
of foreign policy. He said it was imperative to halt the
flow of drugs; that drugs were a menace to the general welfare
of the country, that the drug fight was one of the most important,
the most urgent national priorities; and that keeping drugs
out of the country was as important as keeping the enemy from
entering.

Congress has also recognized the need for such intelligence
and the general propriety of utilizing CIA and NSA to obtain it,
at least to the extent it provided for the funding of such
programs and received reports of the results, e.g., budget
requests.

In addition to those direct sources of authorization, other statutes and actions reasonably suggest that CIA and NSA were not covered by the stricture of §2511 or §605. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Another good example is in the area of narcotics intelligence gathering. In addition to the sources of authority already discussed, the Federal Narcotics and Drug Abuse Act of 1973, 5 U.S.C. §901 et seq., acknowledges that both CIA and NSA have functions relating to the collection of information concerning trafficking in narcotics and dangerous drugs. And here, as in other areas, presidential memoranda closely linked national problems like narcotics with the national security. This too, according to the Agencies, caused them to believe their actions were within the law.

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Finally, there are a number of other events from which NSA and CIA derive support - - or at least approval - - for their surveillance activities.

In July of 1973, William Colby testified before the Senate Armed Services Committee on his nomination to become DCI. In response to a question specifically addressed to whether CIA was then engaged in assisting law enforcement agencies in addition to the FBI, Colby replied in the affirmative, stating that CIA routinely disseminated its foreign intelligence reports to such agencies as the Drug Enforcement Administration, the Immigration and Naturalization Service, the Customs Service, the Secret Service, and the Armed Services. Since ^{re}there was little doubt that at least some of CIA's information was governed by electronic surveillance, the Agency regards the lack of congressional objection as tacit approval of such dissemination.

More direct approval by the Executive Branch is provided by a February 3, 1971, NSA memorandum in which NSA officials described separate briefings two days earlier of Attorney General Mitchell and Secretary of Defense Laird on certain NSA activities. This memorandum reflects that both Mitchell and Laird read and approved a proposed memorandum which set forth proposed ground rules for NSA contribution to intelligence gathering for domestic problems. [REDACTED]

[REDACTED]

[REDACTED]
[REDACTED] CIA files also reflect that the same memorandum was read and approved in 1972 by Richard Kleindienst, then Attorney General.

The participation of the Office of the General Counsel of NSA in the drafting of §2511(3), and the assurance of that office to the Agency that the effect of the subsection was to remove any doubt as to the legality of NSA surveillance is another factor cited by that Agency. A 1968 memo from the General Counsel to the Agency states that the language of §2511(3) "precludes an interpretation that the prohibitions against wiretapping or electronic surveillance techniques in other laws applies to [NSA activities] ... Wiretapping and electronic surveillance techniques are, therefore legally recognized as means for the Federal Government to acquire foreign intelligence information and to monitor U.S. classified communications..."

Although Mr. Kleindienst has no recollection of this briefing, he did not dispute the CIA memo. Mr. Laird also did not remember seeing the memorandum or attending the briefing, but said the memo contained nothing he did not generally know of as early as 1964, when he served on the House Armed Forces Appropriations Subcommittee.

While these factors do not bar a prosecution as such, they do act to cloud the issue considerably so the chances of a conviction are considerably slim.

[REDACTED]

* * *

[REDACTED]

[REDACTED]

Also of importance here is the fact that the program was conducted pursuant to the agency's guidelines and approved by its general counsel. For these reasons, the agency personnel could be said to have acted in good faith which, if true, would tend to frustrate any chance of proving the requisite criminal intent.

Accordingly, the task force recommends against prosecution.

* * *

[REDACTED]

[REDACTED]

[REDACTED]

* * *

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

SECRET

The chance of a successful prosecution are not very good for an important element, criminal intent, would be difficult to prove, and there are serious questions whether the temporary-interception-and-destruction practice would satisfy the "divulgence" or "use" elements of 605.

For all of these reasons the task force recommends against prosecution for these testing practices.

CONCLUSION

This report quite obviously did not focus on the particulars upon which affirmative prosecutive decisions may be made in specific cases. Rather, it attempted to provide the important legal and factual detail one should consider in determining whether inquiry into any specific activities should be terminated for lack of prosecutive potential or whether further investigation should be pursued, e.g., by grand jury.

The task force recommends that all further inquiry be terminated, for there appears to be little likelihood, if any, that convictions could be obtained on the basis of currently available evidence or evidence which might reasonably be developed.

In addition to the difficulty one could expect trying to apply all of these principals to the following facts, there is another problem that should be kept in mind.

Today, we tend to be quite jaded about these matters, for almost everyday we read in the newspapers of a new intelligence-gathering program or technique. Up until the Keith case was decided in 1970, however, very few people even knew about national security wiretapping. For those who did, it was almost impossible to find out anything definitive about the power, for "one simply does not inquire into such matters." In addition, the state of the law was still very much undecided (as noted earlier, it was not until 1967 that the Supreme Court held in Katz that wiretapping protected people in addition to places.) Thus, up until a few years ago this entire matter was shrouded in secrecy, and the lack of any public information, coupled with what now must be considered naive acceptance of claims of national security power, quite understandably could cause some confusion. The problem then will be to try to avoid seeing -- and judging -- everything with the benefit of what might be called 1977 hindsight.

The investigation has not revealed for instance a single case in which intelligence obtained by means of electronic surveillance was gathered or used for personal or partisan political purposes. The participants in every questionable operation, however oblivious or unmindful, appear to have acted under at least some colorable semblance of authority in what they conscientiously deemed to be the best interests of the United States. While they may be regarded from our current perspective as having abused their broad discretionary power on occasion, that ill-defined power was conferred upon them and their agencies with a bevy of sweeping Presidential claims of power, Executive orders and directives, legislation and (e.g., the National Security Act) and a number of NSCIDs. If the intelligence agencies possessed too much discretionary authority with too little accountability, that would seem to be a 35-year failing of Presidents and the Congress rather than the agencies or their personnel.

In addition to all of these problems, there is the specter, in the event of any prosecution, that there is likely to be much "buck-passing" from subordinate to superior, agency to agency, agency to board or committee, board or committee to the President, and from the living to the dead.

Other practical considerations include the implications and complexities of providing discovery of national security materials (e.g., NSC, PFIAB, DOD, and White House documents and record), as well as sensitive foreign intelligence-gathering methodology and technology to any potential defendant and to the public (as the result of any trial). These considerations become particularly acute when weighed against the minimal chances of sustaining the technical proof of violations and the probable lack of juror enthusiasm for convicting those whom the defense may plausibly portray as dedicated employees who only followed orders in trying to protect the national interest, i.e., keep heroin out of the United States.

Rather than to look to possible prosecutions to provide any remedial help, the better remedy might be to seek and to undertake administrative revision of policies and programs. These could include the following proposals:

1. Governmental agencies charged with the research and development of electronic equipment essential to the national security should be provided with clearly defined authority and procedures for testing such equipment against appropriate communications systems.
2. Consideration should be given to seeking specific Congressional and Presidential designation of certain international criminal activities as matters affecting the national security (e.g., international narcotics trafficking, gun-running, etc.) for purposes of foreign intelligence-gathering.

3. National security intelligence agencies should be authorized to provide appropriate U.S. law enforcement agencies with criminal intelligence incidentally obtained in the exercise of their lawful functions, including information indicating criminal activity on the part of U.S. citizens.
4. An effort should be made (consistent with the constitutional rights of criminal defendants) to secure legislation and/or rules changes to prevent the public identification of national security agencies as the source of criminal intelligence incidentally obtained in the exercise of their lawful functions, at least where such evidence is not introduced at trial.
5. The authority of the CIA, NSA and FBI to perform their respective missions in the field of electronic surveillance should be clearly delegated and delineated with specific procedures prescribed for the lawful exercise of that authority.
6. The Office of General Counsel for each intelligence agency should be staffed with one or more attorneys with expertise in electronic surveillance law and Federal criminal law and procedure.
7. Agency personnel should be required to consult their General Counsel and confirm, in advance, the legality of all electronic surveillance projects.

* * *

The recommendations of the task force set forth above are (accepted) (rejected).

BENJAMIN R. CIVILETTI
Assistant Attorney General
Criminal Division

~~TOP SECRET~~

REPORT
ON
INQUIRY INTO
CIA-RELATED
ELECTRONIC SURVEILLANCE
ACTIVITIES

CLASSIFIED BY Robert L. Keuch
EXEMPT FROM GENERAL DECLASSIFICATION
SCHEDULE OF E.O. 11652, EXEMPTION CATEGORY:
§ 5B(1), (S) or (U) (check one or more)
AUTOMATICALLY DECLASSIFIED ON
UNLESSIZED TO DETERMINE

~~TOP SECRET~~

WARNING: THIS
DOCUMENT CONTAINS
CLASSIFIED INFORMATION
AND METHODS INVOLVED

PREFACE

Most of the information contained in this Report was obtained from personnel employed by the various intelligence agencies under investigation. Predictably, their attitudes ranged from circumspection to wariness.

One typically had to ask the right question to elicit the right answer or document. It is likely, therefore, that we had insufficient information on occasion to frame the "magic" question. One also had to ascertain the specific person or division to whom the right question should be addressed, since compartmentalization of intelligence-gathering often results in one hand not knowing what the other is doing.

The latter was particularly true of the offices of general counsel with which we dealt. They were not always consulted beforehand concerning the legality of borderline operations. Indeed, they were not fully aware, until our inquiry, of certain questionable operations engaged in by their respective agencies. In addition, the offices of general counsel evinced a lack of legal expertise in the field of electronic surveillance and a general uncertainty and inexperience in the area of Federal criminal law. It is possible, therefore, that some exculpatory as well as inculpatory facts and documents were not revealed because general counsel did not perceive their relevance or significance.

The degree of overall cooperation with our inquiry varied among the agencies under scrutiny. NSA and DEA, for instance, were generally cooperative. Personnel from both DEA and NSA who had been directly involved in questionable operations readily submitted to interview and cooperated (however guardedly), despite Miranda warnings. The CIA, on the other hand, elected to inform us of the details of questionable CIA activities through CIA personnel who would not be given Miranda warnings, i.e., CIA employees who had not been involved in the questionable operations. Consequently, our briefings on CIA activities were conducted by CIA personnel with only second-hand knowledge gleaned principally from written records. Subsequently, however, several of the CIA personnel directly involved in questionable operations did submit to interview.

Compliance with requests for documents and/or written reports also varied in degree of promptness. NSA and DEA were reasonably prompt. Initially, the CIA was dilatory and the FBI tardy, but both improved as the inquiry progressed. Materials gathered by the Senate Select Committee were not made available for our review until March 2, 1976.

The foregoing impediments, while inconvenient, did not fundamentally alter the final product of our effort to obtain the detailed overview reflected in this Report. Such obstructions might become intolerable, however, in the prosecutive pursuit of specific cases.

Dougald D. McMillan

June 30, 1976

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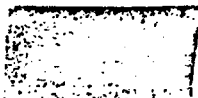


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HANDLE VIA COMINT CHANNELS

I. FINDINGS OF THE COMMISSION ON CIA ACTIVITIES WITHIN THE UNITED STATES

The Report to the President by the Commission on CIA Activities Within the United States (hereinafter referred to as the Rockefeller Commission Report or "RCR") contains various findings with respect to CIA electronic surveillance activities. These findings are set forth below, followed by comments based upon results of the inquiry conducted by the Justice Department Task Force.

A. OFFICE OF SECURITY - Telephone Taps and BugsCommission Findings

The Office of Security conducted 32 domestic wiretaps (the last in 1965), and engaged in 32 instances of bugging (the last in 1968). None of these was conducted pursuant to a judicial warrant, and only one was with the written approval of the Attorney General. (RCR 30; 167-168)

The Commission found two cases in which the telephones of three newsmen were tapped in an effort to identify their sources of sensitive information. These occurred in 1959 and 1962. The latter was apparently conducted with the knowledge and consent of the Attorney General. (RCR 164)

Some of these activities were clearly illegal at the time they were conducted. Others might have been lawful at the time, but would be prohibited under current legal standards. (RCR 160)

Comment

The analysis of available information (Tab A1) indicates a total of 36 (possibly 38) rather than 32 telephone taps by the Office of Security, and 35 (possibly 38) mike-and-wire operations instead of the 32 instances of "bugging" reported by the Rockefeller Commission. In addition, both the last known telephone tap and mike-and-wire operation were conducted in October, 1971, rather than 1965 and 1968, respectively. These differences appear to be academic, however, since the five-year statute of limitations (18 U.S.C. 3282) has expired as to all the interceptions except those in October, 1971, which were consensual.

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HANDLE VIA COMINT CHANNELS

With respect to CIA electronic surveillance of newsmen, an examination of available files indicates that in 1959 a foreign newspaper correspondent and two U.S. writers were the subject of telephone taps. The foreign newspaper correspondent was also the subject of a mike-and-wire operation. In 1963, two U.S. newspaper reporters were the subject of a CIA telephone tap. (Tab A2) Obviously, the statute of limitations has long barred any possible prosecution for substantive offenses based upon these interceptions.

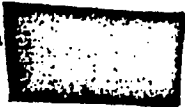
B. COUNTERINTELLIGENCE STAFF, DEPUTY DIRECTOR OF PLANS - Collection of Information On American Dissidents, etc.

Commission Findings

The Commission found no evidence that any of the agents or CIA officers involved with any of the dissident operations (CHAOS) employed or directed the domestic use of any electronic surveillance or wiretaps against any dissident group or individual. Operation CHAOS, however, received materials from an international communications activity of another agency of the government. These communications passed between the United States and foreign countries. None was purely domestic. (RCR 24; 141-142)

Comment

Investigation has developed nothing to contradict the Commission's finding that there is no evidence CIA employed or directed the domestic use of any electronic surveillance or wiretaps against any dissident group or individual in Operation CHAOS. (Tab B1) The other government agency referred to by the Commission as having furnished Operation CHAOS with international communications materials has been identified as the National Security Agency. (The electronic surveillance activities of NSA are discussed in II (B), infra.)

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C. DIRECTORATE OF OPERATIONS - Telephone Toll
Records Reflecting Contacts Between the
United States and Hostile Countries.

Commission Findings

During 1972 and 1973, the Directorate of Operations obtained and transmitted to other components of CIA certain information about telephone calls between the Western Hemisphere (including the United States) and two other foreign countries. Some of the calls involved American citizens within the United States. The information obtained by the Directorate of Operations was limited to the names, telephone numbers and locations of the caller and the recipient. The contents of the call were not indicated. Shortly after the program commenced, the Office of the General Counsel issued a brief memorandum stating that receipt of this information did not appear to violate applicable statutory provisions.

Collection of this material was terminated in May 1973.

The Commission was unable to discover any specific purpose for the collection of telephone toll call information, or any use of that information by the CIA. In the absence of a valid purpose, such collection is improper. (RCR 213-214)

Comment

A review of CIA files revealed that from September, 1971 to the Spring of 1972, [REDACTED] obtained telephone toll records from Al&I reflecting some 270 telephone calls between the United States and Red China.

The legitimacy of this source of intelligence was confirmed in February 1972, by the Office of General Counsel, CIA. (Tab C1) The opinion of the OGC cites United States v. Covella, 410 F.2d 536, c.d. 396 U.S. 879 (1969), and appears to be well reasoned and soundly based.

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HANDLE VIA COMINT CHANNELS

- D. DIRECTORATE OF OPERATIONS - Electronic
Surveillance for Narcotics Intelligence
(Brandy Operation)

Commission Findings

Beginning in the Fall of 1973 the Directorate of Operations, at the request of NSA, monitored telephone conversations between the United States and Latin America for a period of three (or six) months in an effort to identify narcotics traffickers. This was immediately terminated upon the issuance of an opinion by the CIA General Counsel that it was illegal. (RCR 37; 222-224)

Comment

Examination of CIA files and the interview of various CIA officials established that from October, 1972 through January, 1973 (rather than the "fall of 1973"), [REDACTED] the CIA intercepted high frequency commercial radio telephone communications between the United States and Latin America for the purpose of gathering foreign narcotics intelligence. (Tab D)

The CIA undertook this narcotics intelligence collection effort at the request of NSA which had previously accepted tasking requests from ENDD to gather narcotics intelligence from international communications.

[REDACTED] furnished NSA with transcripts of the intercepted calls which were selected on the basis of a "Watch List" of names and telephone numbers provided by NSA. NSA distributed the intelligence to ENDD. [REDACTED]

This electronic surveillance activity presents prima facie questions of criminality and is well within the limitations period. (See "Possible Violations", V, infra.)

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Investigation has confirmed the Rockefeller Commission's findings that the [redacted] was conducted without the knowledge of the "CIA component with responsibility for narcotics intelligence collection." (RCR 222). This CIA component was known successively as the "Narcotics Coordinator" and "NARCOG" which are also discussed herein. (See II(A)(1), infra.)

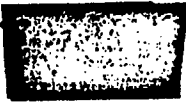
E. DIRECTORATE OF SCIENCE AND TECHNOLOGY -
Interception of Domestic Communications
In Testing Electronic Equipment

Commission Findings

In the process of testing monitoring equipment for use overseas, the CIA has overheard conversations between Americans. The names of the speakers were not identified; the contents of the conversations were not disseminated. All recordings were destroyed when testing was concluded.

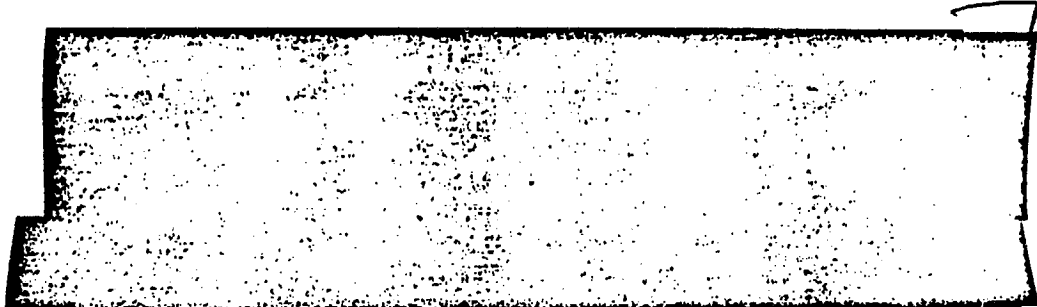
The acquisition of communications incidental to the testing of interception equipment appears to be prohibited by 18 U.S.C. 2510 et seq. (RCR 37; 64; 228)

Comment

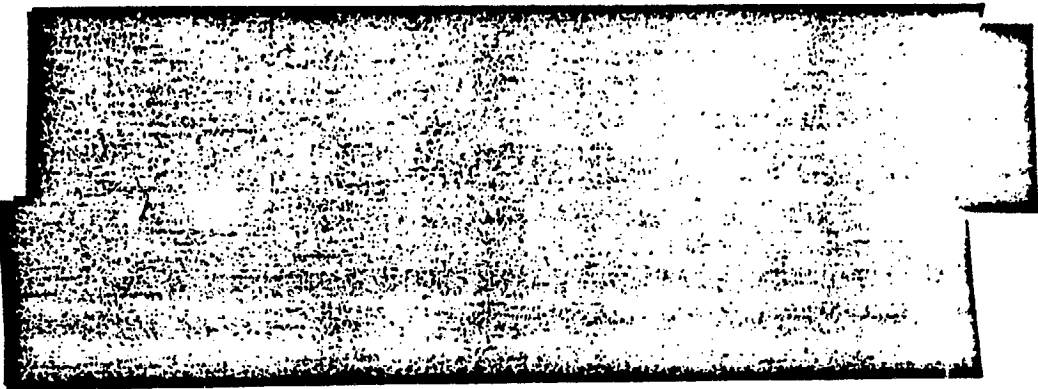
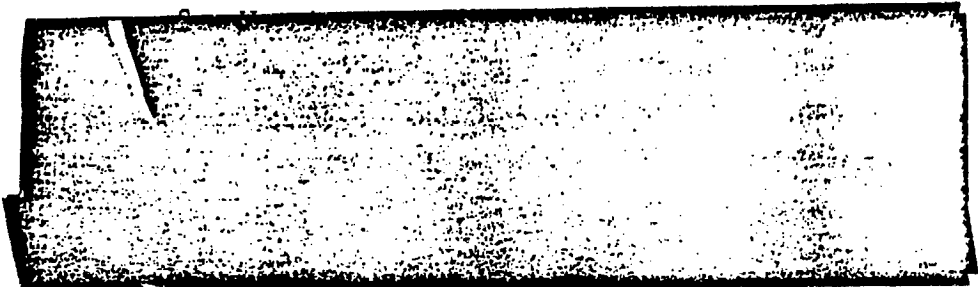
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The five-year statute of limitations would bar prosecution for possible substantive offenses involved in this project.



The limitations period for prosecuting possible substantive offenses related to this activity expired in 1974.

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

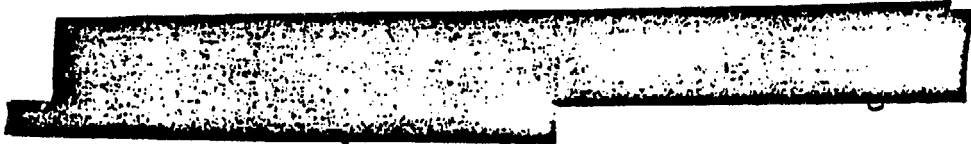
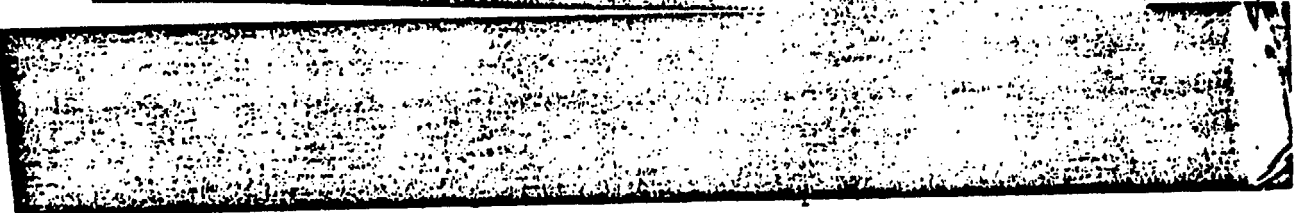
[REDACTED] Consequently, there is no basis for prosecutive
action.

[REDACTED]

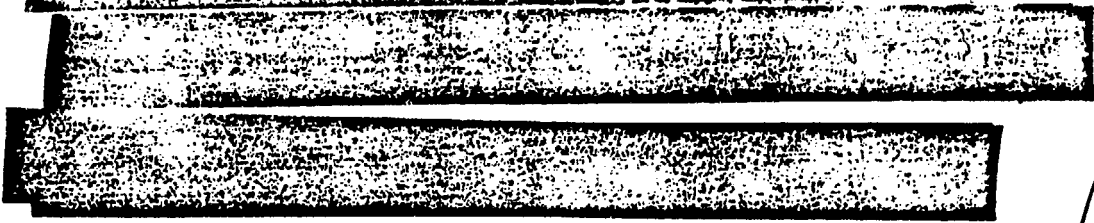
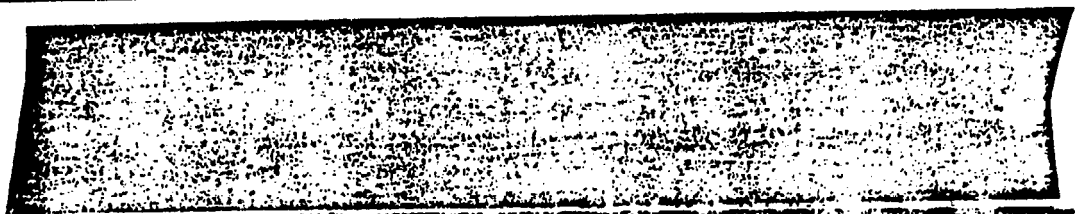
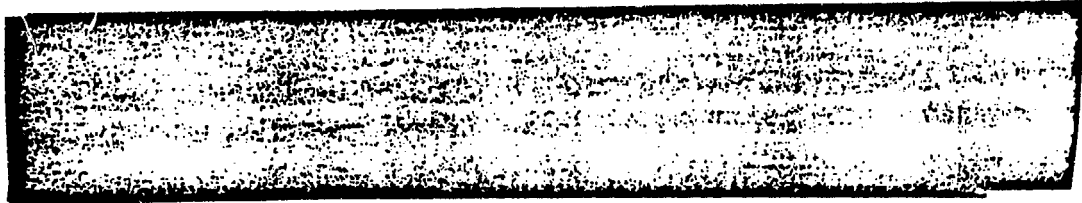
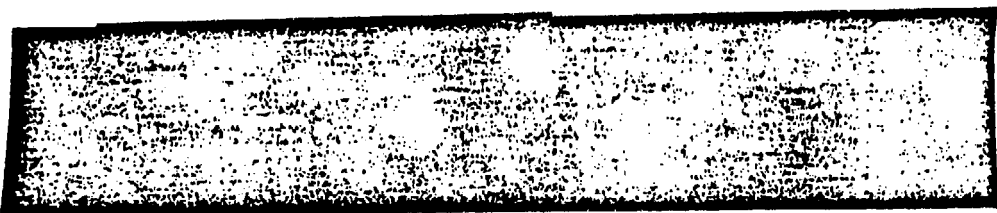
[REDACTED]

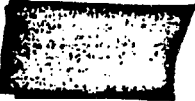
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[REDACTED]



The limitations period regarding any possible prosecution arising from this activity will expire in May, 1976. See "Possible Violations" below.



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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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F. Office of Security - Assistance to Washington, D.C.
Metropolitan Police Department and the Secret Service

Commission Findings

The CIA has on at least one occasion provided some technical assistance in an actual police operation being carried out by the Metropolitan Police Department. In late 1968 or early 1969, CIA was asked to provide the Department with transmitters which could be planted in several lamps to be placed in the apartment of a police informer who frequently met with members of dissident groups. CIA agreed to provide the requested equipment. The lamps were provided to CIA and the transmitter devices were installed in the lamps by personnel from the Office of Security. The lamps were then placed back in the police informer's apartment by the police. The police informer was aware that the apartment was being bugged and consented to the operation. (RCR 296)

Comment

Pursuant to the request of AAG Richard Thornburgh on August 19, 1975, the FBI is currently conducting an investigation of alleged bugging activities involving the Washington Metropolitan Police Department (MPD). This investigation is being monitored by AUSA Donald E. Campbell, Deputy Chief, Major Crimes Division, U.S. Attorney's Office, Washington, D.C., and James Robinson, General Crimes Section, Criminal Division, U.S. Department of Justice.

1. Washington Metropolitan Police Department

Records obtained from the Rockefeller Commission files reflect that in September, 1968, the CIA loaned "lamps with transmitters" to [REDACTED]

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of the Washington Metropolitan Police Department, and that the lamps were not returned to CIA. (Tab A3)

2. United States Secret Service

The Rockefeller Commission records also reflect that the CIA furnished the following equipment to the Secret Service:

- (1) Receiver R5-111-1B-170, loaned to [REDACTED] USSS, on 27 July 73, and not returned.
- (2) Clandestine Transmitter (Com'l), to [REDACTED] USSS, and returned. (The date the equipment was loaned is unknown).

According to a Metropolitan Police Department investigative report to Mayor Walter Washington on March 7, 1975, the only intercept utilized in connection with demonstration activities consisted of a recording device in the apartment of a special employee of the MPD in order to secure information regarding planned anti-war activities of an illegal nature. This consisted of one-party consent and was purportedly a legal installation. (Tab A4)

FBI investigative reports reflect that a special employee of the MPD from 1968-1972 was interviewed by FBI agents and stated that in 1968, she traveled to Chicago with a representative of the MPD to cover radical activities which were expected to occur in conjunction with the Democratic National Convention, and that her hotel room was subsequently monitored by electronic surveillance conducted by the Secret Service. She further acknowledged her role in electronic surveillances conducted by the MPD of her residences on [REDACTED]

[REDACTED] She indicated this monitoring was accomplished

with transmitters which were present in two lamps furnished to her by the MPD.

Secret Service personnel were interviewed and confirmed that the Secret Service had participated in the consensual electronic surveillance of the informant's hotel room in Chicago in 1968, and a residence occupied by her in the [REDACTED]

Prior to the May Day Demonstrations in 1971, the Secret Service is alleged to have participated with the MPD in the consensual electronic surveillance of the apartment of another MPD informant. This apartment was reportedly located at [REDACTED] and CIA is further alleged to have furnished some of the equipment utilized by the MPD in conducting this electronic surveillance.

Secret Service officials confirmed to the FBI that prior to the May Day Demonstrations in 1971, the MPD requested and obtained the assistance of the Secret Service in the consensual electronic surveillance of the above apartment. At the same time, the Secret Service also monitored, with the MPD, two listening devices in the apartment of the aforementioned female informant. The latter was also consensual.

A former MPD Intelligence Division officer confirmed that he participated in an electronic surveillance of the female informant's apartment "several weeks" after the bombing of the U.S. Capital in March, 1971.

The above surveillances were apparently conducted between March 17, 1971 and May 4, 1971.

Departmental Attorney James Robinson will endeavor to ascertain any further involvement the CIA might have had in the above or related activities.

George Clarke, CIA Associate General Counsel, advised as follows:

... [T]hroughout the Office of Security's research pursuant to the Rockefeller Commission and Congressional investigations of the Agency, there have been no indications that the Office of Security has ever directly assisted and/or participated in any electronic surveillance activities with the Metropolitan Police Department.

No assistance has been rendered or equipment loaned to the Metropolitan Police Department by Division D [CIA] in connection with electronic surveillance activities. (Tab A5) ←

However, Mr. Clarke furnished CIA memoranda reflecting loans of communications equipment to the Metropolitan Police Department and other police departments. (Tab A6)

Mr. Clarke also furnished CIA memoranda reflecting loans of communications equipment to the Secret Service (Tab A7), and further advised:

The U.S. Secret Service (USSS), under the authority contained in Title 18, U.S. Code, Section 3056, as amended by P1 90-331, regularly tasks the CIA to provide real-time communications intelligence close support to the USSS during the foreign travel of the President and other protectees designated by the USSS. The CIA, in response to such tasking, monitors, on the scene, those local, foreign military and internal security communications supporting elements responsible for the physical protection of visiting protectees. The results of this monitoring are immediately passed to the USSS on-scene. On occasion, local USSS communications may also be monitored by the CIA team. However, all such monitoring is at the specific request of the USSS.

The majority of the Office of Security's assistance to the Secret Service has been related to counteraudio measures in connection with the protection of the President and/or Vice President. Since 1974 no electronic equipment, capable of intercepting oral communications, has been loaned to the U.S. Secret Service by the Office of Security....

The arrangement between the CIA and Secret Service was formalized by written agreement in 1971. (Tab A8)

In sum, the foregoing assistance to other agencies does not indicate prosecutable violations on the part of CIA personnel

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II. ADDITIONAL AREAS OF INQUIRY

A. Central Intelligence Agency

1. Narcotics Coordinator and NARCOG (Tab E)

In October, 1969, the President designated international narcotics control a concern of U.S. foreign policy and established the White House Task Force on Heroin Suppression. The Director of Central Intelligence (DCI), Richard Helms, was named to the membership of the Task Force and directed by the President to provide the Task Force with CIA assistance. Consequently, a CIA office of Narcotics Coordinator was established under the Deputy Directorate of Plans (now the Deputy Directorate of Operations).

The duties of the CIA Narcotics Coordinator ~~XXXXXXXXXX~~ included the representation of CIA on the Working Group of the White House Task Force and narcotics liason with other agencies. Since the initial concern of the White House Task Force was narcotics trafficking in Turkey and Southeast Asia, the CIA provided the Task Force with narcotics intelligence reports and studies concerning both areas. Additionally, ~~XXXXXXXXXX~~ advised, the Task Force was interested in the European connections between Latin American traffickers and Turkish opium suppliers, and the CIA contributed information in this regard.

With respect to the CIA's cooperation with other agencies, ENDD tasking memoranda to CIA reflect that during the time the White House Task Force was in existence, the CIA provided ENDD with assistance in training programs, loans of funds for overseas operations, intelligence reports on international narcotics traffickers, and other narcotics developments overseas. Some of this information was obtained as the

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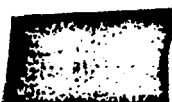
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incidental by-product of national security electronic surveillances overseas, and some from overseas interceptions specifically conducted for international narcotics intelligence. CIA assures, however, that none of these electronic surveillance operations was conducted within the United States or from lands reserved for use by the United States; neither were any of the interceptions targeted against communications having one terminal in the United States.

In August, 1971, the President upgraded the priority of the international narcotics control effort by replacing the White House Task Force with the Cabinet Committee on International Narcotics Control (CCINC). The CIA Narcotics Coordinator was named chairman of the CCINC Working Group Intelligence Subcommittee. He was reportedly instructed by DCI Richard Helms to avoid involvement in domestic law enforcement activities and ENDD's domestic intelligence operations. CIA continued to provide ENDD (also a member of the Intelligence Subcommittee) with foreign narcotics intelligence and various support (e.g., training, "flash rolls") for its overseas operations.

The CIA Narcotics Coordinator furnished ENDD with reports of the following types:

1. FIRDB, TDFIRDB, TDFIR, etc. (Foreign Intelligence Reports): Collected by the Office of Operations from foreign field offices with description of the sources included in the reports.
2. OO Reports: Compiled by the Domestic Collection Division exclusively from interviews of people who had traveled to foreign countries.

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3. Analytical Report: The only known report of this type was a study entitled "Cocaine Trafficking Network in Colombia."
4. Daily Reports (i.e., USIB National Intelligence Bulletin): Pertained primarily to geopolitical intelligence. It is not narcotics oriented.
5. Weekly Summary: Geopolitical bulletin. Not narcotics oriented.
6. Miscellaneous Reports: These included teletypes of specific information which may or may not have been COMINT, and also included Director of Operations Narcotics Control Reports (DONCS) which were sent directly to ENDD's Chief of Strategic Intelligence, [REDACTED]

There is no indication that the CIA Narcotics Coordinator furnished ENDD with any narcotics intelligence reports other than the foregoing.

CIA's Office of Narcotics Coordinator was reorganized on June 12, 1972, as the Narcotics Coordination Group, or NARCOG. The principal duties of NARCOG did not differ from those previously assigned the Narcotics Coordinator. NARCOG provided support to the CCINC and coordinated the CIA's narcotics intelligence programs. NARCOG also continued responding to ENDD/DEA's intelligence requirements by furnishing ENDD/DEA with the above described reports.

The first chief of NARCOG, [REDACTED] (6/19/72 - 7/19/74), was reportedly instructed by the DCI and the DDP to avoid involvement in domestic narcotics enforcement operations as well as foreign operations targeted against American citizens. When overseas CIA stations inadvertently acquired information concerning the narcotics trafficking activities of U.S. citizens, the local CIA official would reportedly surrender the information to his local

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BNDD counterpart and take steps to insure that no further collection on the U.S. citizen occurred.

While much of the information provided the CCINC by CIA was obtained as a result of CIA's overseas national security electronic surveillance operations [REDACTED] and his two successors, [REDACTED] (Chief, 7/74 - 12/74), and [REDACTED] (Chief, 1/75 - present), advised that NARCOG neither conducted nor requested the conduct of electronic surveillance operations domestically or against any communications having one terminal in the United States. [REDACTED]
[REDACTED]

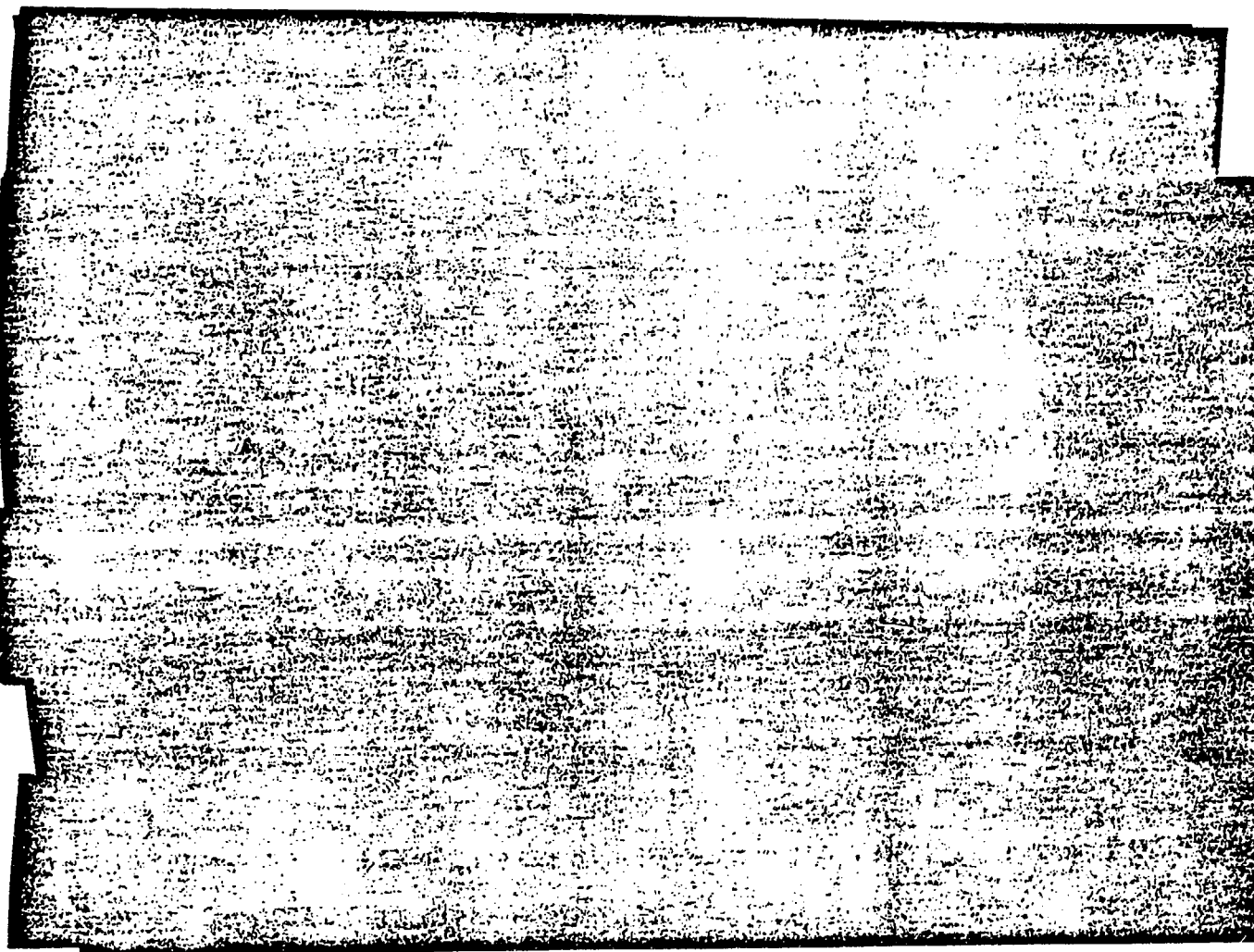
Inquiry has confirmed that NARCOG officials were keenly aware of the prohibition against involvement in domestic operations. During his tenure as NARCOG chief, [REDACTED] reportedly sought to insure against this sort of activity by renaming the CCINC Intelligence Subcommittee the Foreign Intelligence Subcommittee, and took steps to insure that U.S. citizens' names were excluded from the MINT Register, an inter-agency listing of individuals involved in illicit foreign narcotics trafficking.

2. LPMEDLEY (Tab G)

On August 18, 1966, Dr. Louis Tordella, Deputy Director, NSA, met with Thomas Karamessines, then Acting Deputy Director of Plans, CIA, and requested CIA's assistance in setting up a small cover office in downtown Manhattan. Dr. Tordella explained that NSA needed the office so that NSA employees could copy international telegraphic communications received from [REDACTED]

~~TOP SECRET~~ [REDACTED]

commercial carriers (SHAMROCK). The copying process, previously performed in Washington, D.C., had to be shifted to New York because of technical problems. CIA accepted NSA's requirement and assigned the project the cryptonym LPMEDLEY. Beginning on November 1, 1966, and continuing through August 31, 1973, the CIA provided NSA with space in a commercial building in lower Manhattan and a front for the NSA operation. The CIA was reimbursed by NSA for expenditures incurred in this project.



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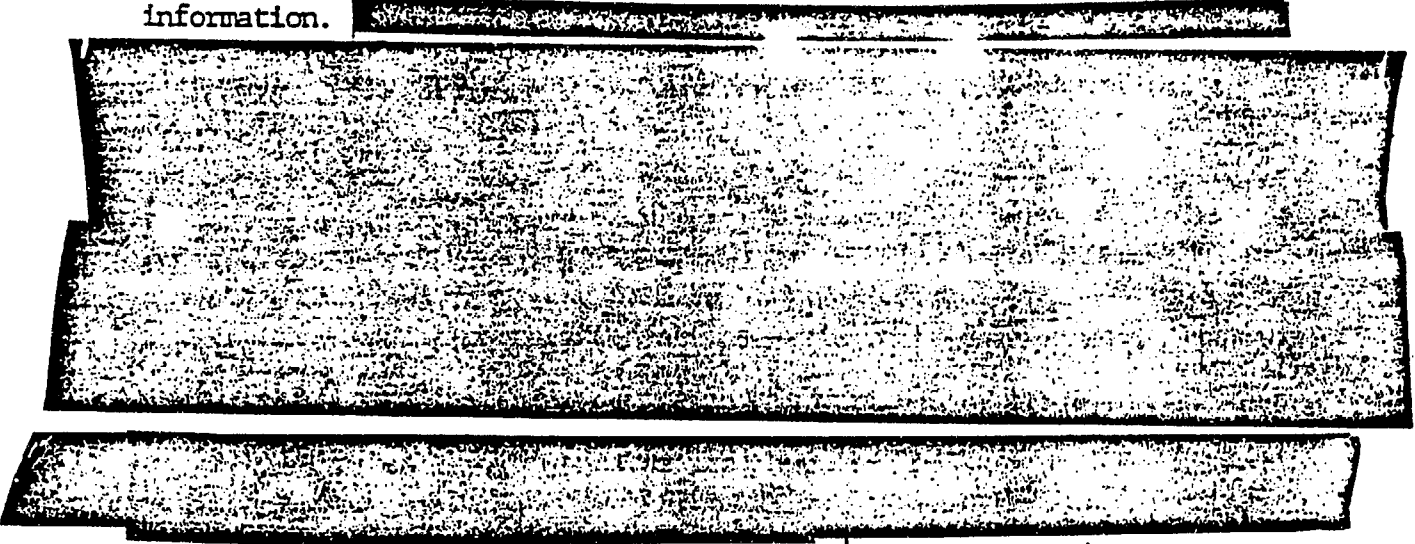
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HANDLE VIA COMINT CHANNELS

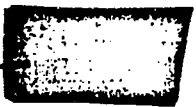
5. Overseas Intercepts (Tab J)

The overseas electronic surveillance operations of CIA provided a source of information to various government agencies concerning such matters as the influence and participation of foreign governments in domestic militant movements, and the international narcotics control effort.

With respect to the support of U.S. dissidents by foreign governments, CIA stations were instructed to provide CIA headquarters with pertinent information.



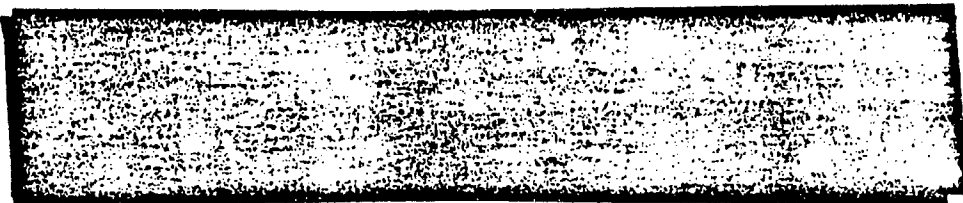
In its endeavor to provide ENDD/DEA with valuable international narcotics intelligence, the CIA conducted foreign communications intercept operations against specific targets overseas. These operations could have been initiated pursuant to requests from CIA Headquarters or from several different governmental entities including ENDD/DEA Headquarters and ENDD/DEA District or Regional offices. With respect to the tasking of CIA by ENDD/DEA foreign field offices, CIA officials advised that the CIA field stations would not undertake any such electronic surveillance activities without

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first obtaining authorization from CIA Headquarters.

Although the CIA provided BNDD/DEA with information obtained from overseas electronic surveillances, the CIA took precautions to insure that the method of collection and the source of the information would not be revealed. In some cases, however, the recipients of the information were BNDD/DEA officials directly involved in the CIA overseas operation and the obfuscation of source was not possible. In such event, the CIA station would ask the BNDD/DEA officer not to reveal the source if he passed the information on to BNDD/DEA Headquarters. Thus, when BNDD/DEA Headquarters received communications intercept information from CIA Headquarters, the source usually would not be identified as an overseas interception. At times, however, the nature of the information made it apparent to the consumer that it was obtained as a result of electronic surveillance.

The CIA used electronic surveillance as a method of collecting narcotics intelligence overseas, and because CIA provided such information to BNDD/DEA, several narcotics investigations and/or prosecutions had to be terminated. In these instances, the CIA and the Department of Justice were fearful that the confidentiality of CIA's overseas collection methods and sources would be in jeopardy should discovery proceedings require disclosure of the CIA's electronic surveillance activities. The following investigations and cases were affected by this concern:



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[REDACTED]

[REDACTED]

Frank Matthews: [REDACTED]

[REDACTED]

[REDACTED] Matthews and others were indicted in the Eastern District of New York on domestic narcotics distribution charges only, and nine others were severed from the indictment. (Tab J4)

Gustavo Guerra - Montenegro: In 1972, an indictment which had been returned in the Southern District of California charging Guerra and six others with narcotics trafficking was dismissed. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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Copy 1 of 2
[REDACTED]
Rafael Alarcon: [REDACTED]
[REDACTED]

The DEA investigation resulted in his indictment in the Eastern District of New York and the Southern District of New York. He was eventually extradited from S.A. to the U.S., [REDACTED] and pled guilty to a reduced charge.

[REDACTED]

According to Associate CIA General Counsel John Greaney, the foregoing disposition of the [REDACTED] was approved by Henry S. Dogin, DAAG, Criminal Division. The chronology of CIA electronic surveillance coverage [REDACTED] which was furnished to AAG Henry Petersen, DAAG Dogin, et al., in November, 1974, indicates that telephone communications between [REDACTED] United States had been intercepted. (Tab J4) -/

(Note: This Report does not purport to deal with possible difficulties arising under 18 U.S.C. §3504 in closed narcotics cases. That is the subject of a 2/5/76 Memorandum of Study conducted by Phillip T. White, Chief, Legislation and Special Projects.)

6. CIA-ENDD Miami Operation (DEACON I) (Tab K)

In October, 1972, during a meeting with ENDD Director Ingersoll, DCI Richard Helms offered to recruit a former CIA contract employee to work for ENDD in Miami on its EUNCION narcotics intelligence project. The employee thereafter became a "staff agent" for ENDD but retained his CIA cover. The CIA has advised that "... the Agency did not control or participate in the formulation of duties assigned the agent by ENDD." DEA advised that although the CIA paid the agent, the funds were actually received from ENDD, but paid

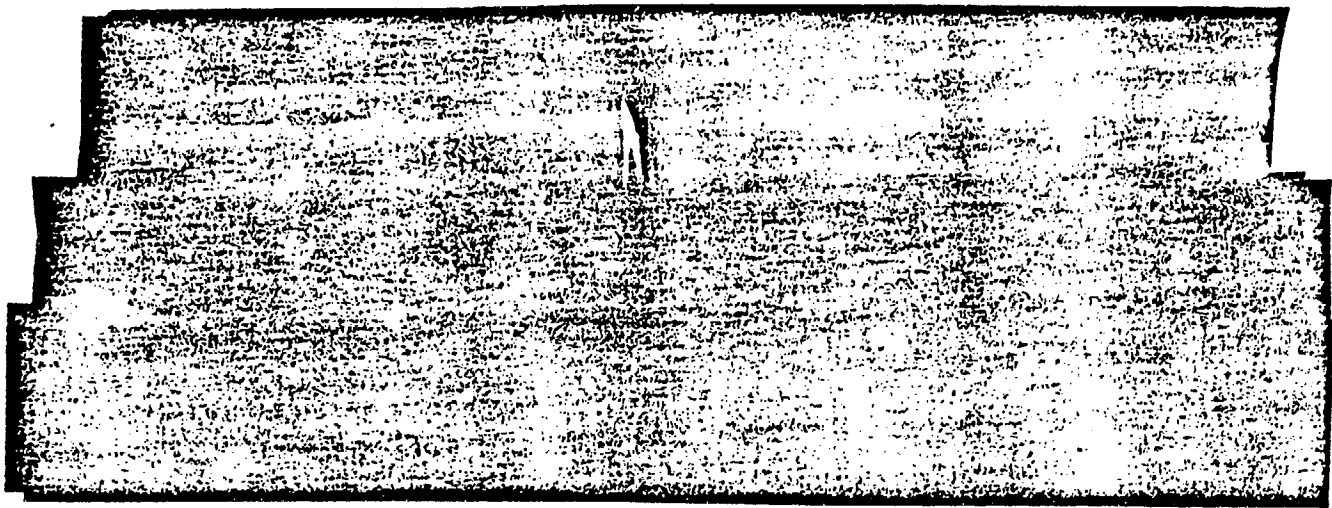
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by CIA to avoid having DOJ records reflect the payment. DEA advised that BNDD used the agent as a live source for information concerning Latin American narcotics traffickers and their organized crime connections in Miami.

This project utilized agents in addition to the ex-CIA contract employee and may be generally described as a narcotics intelligence collection program targeted at Latin America. It was first designated BUNCIN, and later, with the formation of DEA, became known as DEACON I. According to DEA, the former CIA contract employee reported to a BNDD official in Miami who reportedly was also an ex-employee of the CIA.

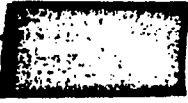
CIA advised that the Agency's involvement in the project was part of a program established to recruit agents for BNDD and which was terminated in the fall of 1973. In addition, CIA advised - and DEA concurred - that there is no indication that any communications were intercepted during the course of the above activities.



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8. Procurement of Private Parties to Intercept Communications (Tab M) 7

An inquiry was made to determine whether the CIA has procured private individuals, parties, or corporations to intercept communications having one or both terminals in the United States since June 19, 1968, the date Title III was enacted. The CIA advised that the "... appropriate components of CIA discovered no record of interceptions..." relative to this inquiry.)

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(B) National Security Agency

1. MINARET (Tab N)

MINARET was a cryptonym applied by NSA to a project chartered on July 1, 1969 in which NSA analysts selected from two primary foreign intelligence sources certain by-product intelligence involving several areas of interest. The primary sources were: (1) NSA's interception of international commercial carrier (ILC) voice and non-voice communications [redacted] and (2) copies (or tapes) of international messages furnished to NSA by U.S. commercial communications carriers in the "Shamrock" operation.

The by-product intelligence was initially sought in the following areas of activity:

1. Foreign governments, organizations and individuals attempting to influence, coordinate, or control U.S. organizations and individuals who might incite or foment civil disturbances, or otherwise undermine national security.
2. U.S. organizations or individuals engaged in activities which might result in civil disturbances or otherwise subvert the national security.
3. Communications from, to, or concerning groups and individuals [redacted]
4. Communications which indicated foreign contacts or connections with various assassins, [redacted]
5. Military deserters involved in the anti-war movement.

In mid-1970 the scope of MINARET was enlarged to include the selection of intelligence concerning international narcotics trafficking, particularly the illegal importation of dangerous drugs and narcotics into the United

States. From September 4, 1970 until June 1973, this included the interception of high frequency radio-telephone (commercially) voice communications between the United States and several South American cities. [REDACTED]

[REDACTED]

[REDACTED]

The purpose of the MINARET project was to provide by-product intelligence to various Federal departments and agencies in response to their requests or requirements. In responding to such requirements, however, NSA purportedly relied upon implicit assurances of requesting agencies that their need for the intelligence was legitimate. In addition, NSA dealt only with "foreign communications", i.e., communications having at least one terminal on foreign soil.

The MINARET charter also provided that appropriate measures would be taken, in disseminating intercepted communications, to insure that NSA could not be identified as the source of the intelligence.

Closely associated with the MINARET project are the "Watch Lists" and [REDACTED] furnished NSA by such consumer agencies as the FBI, Secret Service, ACSI, DIA, CIA and [REDACTED].

ENDD. [REDACTED]

[REDACTED]

~~TOP SECRET~~ [REDACTED]

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The Watch Lists

[REDACTED] were used by NSA analysts in processing ILC voice communications and "drop copy" messages obtained in the Shamrock Operation.

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

In late 1971, when the DCI was designated by the President to assume the role of intelligence coordinator for the President's Cabinet Committee on International Narcotics Control (CCINC), it appears that the CIA, FBI and BNDD were authorized to levy drug-related intelligence requirements on

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NSA. Later, in 1972, when NSA began collecting intelligence on terrorists and terrorist-related matters, the FBI, Secret Service and CIA were designated as tasking and consumer agencies. .

It should be noted that the objectives of [REDACTED] at least in general terms, were probably approved by two successive Attorneys General and a Secretary of Defense. (See F(3), infra.)

With respect to the CIA's involvement in drug-related intelligence gathering, it is noted that from October 1972 to January 1973, at NSA's request, CIA engaged in the interception of high frequency radio transmissions of commercial voice communications between the U.S. and South America from a monitoring station in [REDACTED]. [REDACTED] was terminated on January 29, 1973 when the General Counsel of CIA advised it was unlawful.. (See summary of [REDACTED] I(D), supra.)

It cannot be precisely stated when the [REDACTED] project terminated since the termination occurred in phases, but the narcotics phase apparently ended in May 1973 when, after discussions with CIA General Counsel, NSA discontinued this phase of [REDACTED] NSA's assistance to the FBI and Secret Service through [REDACTED] continued until October, 1973, when Attorney General Richardson instructed the directors of those agencies to stop requesting information obtained by NSA through electronic surveillance. On the same date, the Attorney General directed the Director NSA not to respond to requests from these agencies or "any agency to monitor in connection with a matter that can only be considered one of domestic intelligence".

Our investigation reveals that in November 1973, NSA excised the names of all U.S. citizens from the Watch List [REDACTED]

~~TOP SECRET~~ [REDACTED]

3. SHAMROCK (Tab P)

SHAMROCK is the code name of an operation initiated by U.S. military intelligence officers in 1945 in which United States international communications carriers agreed to furnish them with copies of diplomatic messages received or routed over commercial circuits. NSA inherited this activity when it was created in 1952 to direct the national communications intelligence effort.

A review of the circumstances surrounding the inception of SHAMROCK in 1945 reveals that it was an outgrowth of the World War II "censorship" program and was conducted initially under the aegis of the Assistant Chief of Staff for Intelligence, General Hoyt Vandenberg. There was a general reluctance on the part of the carriers (based on advice of their house counsel) to engage in such activity unless certain conditions were met, including the personal assurance of the Attorney General that the companies would be protected "in case of suit". Although the first expression of such assurance apparently occurred on April 20, 1949, it appears that the carriers had begun cooperating with the military in mid-1945 based upon the representations of General Vandenberg and lower-echelon intelligence officers that such intelligence was a matter of vital importance to the national security.

Investigation reveals that in December, 1947, Secretary of Defense James Forrestal met with officials of RCA, ITT, and Western Union International and said he was speaking for President Truman in commending them for their cooperation in SHAMROCK. He further requested their continued

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assistance because the intelligence constituted a matter of great importance to the national security.

On May 18, 1949, Secretary of Defense Louis Johnson met with officials of the same companies and stated that President Truman, Attorney General Tom Clark, and he, endorsed the Forrestal statement and would provide them with a guarantee against any criminal action which might arise from their assistance. According to former Secretary of Defense Melvin Laird, NSA's SHAMROCK operation was tacitly endorsed by him during his term of office (1969-1973).

When NSA assumed responsibility for the SHAMROCK operation in 1952, varying practices and procedures (which would later change) had already been established between the military and the commercial carriers which permitted NSA employees access to all diplomatic messages transmitted, routed or received by the RCA, ITT and Western Union offices located in New York City and Washington, D.C., as well as the RCA and ITT offices in San Francisco. RCA provided NSA employees with duplicates (drop copies) of all international messages, thus requiring the NSA employees to visually screen and select-out diplomatic messages for microfilming on NSA-owned machines located on the RCA premises.

[REDACTED]

[REDACTED]

[REDACTED] Investigation shows that NSA employees were also given access to all perforated paper tape copies of international messages transmitted by RCA, and until 1965, were

receiving parcels from the New York City ITT office which were believed to contain perforated paper tapes transmitted or received by the ITT office [REDACTED]

Although SHAMROCK is commonly referred to as a "drop copy" operation, this characterization is somewhat misleading since it applies only to that part of the-overall operation in which NSA employees were given access to duplicate copies of international messages which were prepared for accounting purposes. When RCA began using more sophisticated equipment in 1960, the "drop copy" operation became minimal. Investigation reveals that beginning in 1960, the visual screening and selecting-out process accomplished by NSA employees at RCA was terminated, and all international message traffic was simply photographed by NSA employees and forwarded to NSA headquarters for screening and selecting-out.

A similar situation with respect to RCA and ITT obtained after 1965 when they switched to the magnetic tape process. It has been estimated by NSA that during the period 1960-1965, before the magnetic tape process began, 97% of the messages received at NSA were discarded because they failed to meet NSA's criteria [REDACTED]

[REDACTED]

~~TOP SECRET~~ [REDACTED]

Although NSA purportedly adhered to the practice of discarding all international messages obtained from commercial carriers which were not [REDACTED] (and purportedly has steadfastly followed a practice of discarding all messages of a personal nature at the earliest possible moment of discovery), there came a time in the late 1960s, probably 1967, when unbeknown to RCA and ITT, (Western Union participation ended in 1969), NSA selected-out international messages containing the names of persons on the Watch Lists. This continued until October 1973 when Attorney General Richardson terminated the practice by which NSA responded to specific requests from governmental agencies. The SHAMROCK operation was terminated in May, 1975.

Investigation also indicates an FBI involvement in the SHAMROCK operation from 1963 to 1973. During this time, the FBI obtained copies of international cable traffic from RCA and ITT in New York City and Washington, D.C. [REDACTED]

[REDACTED] Until 1973,

~~TOP SECRET~~ [REDACTED]

NSA received a daily package of such communications from the FBI Field office in Washington, D.C. These packages contained what are believed to have been "drop copy" messages of [REDACTED]

[REDACTED] It is estimated that 95% of these messages were discarded by NSA because they did not fit any of NSA's intelligence criteria. (See II(C), infra.)

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[REDACTED]

[REDACTED]

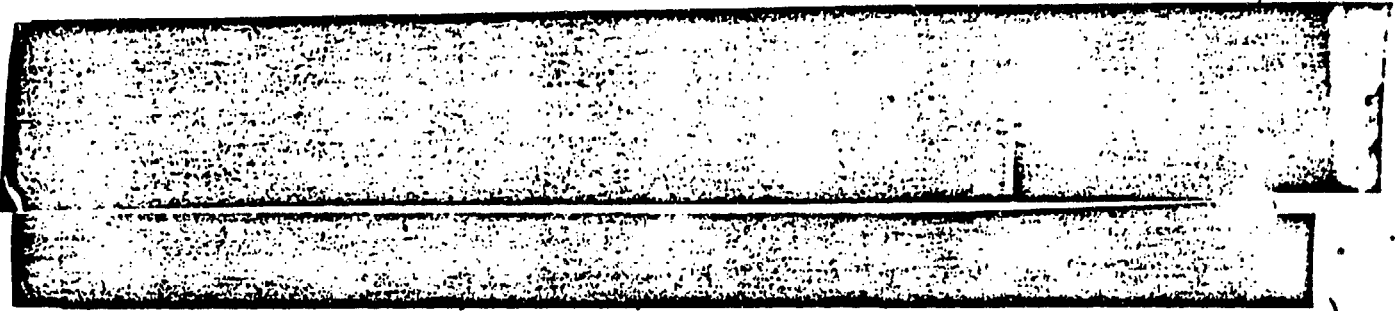
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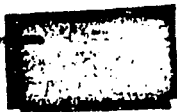
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C. Federal Bureau of Investigation (Tab R)

In July, 1975, the national press publicized the intelligence-gathering operations of NSA and the FBI known, respectively, as SHAMROCK and the "Drop Copy Operation". (See II(B), infra.) The FBI immediately furnished the Attorney General with summaries of background information (Tab R1), and provided the writer, et al., with a partial briefing on October 20, 1975. On October 30, 1975, the FBI was requested to provide the Criminal Division with a detailed written report on its involvement in the operation. The report was received on February 24, 1976. (Tab R2)

(Note: This Report does not purport to cover the electronic surveillance activities of the FBI. Inquiry into the FBI "Drop Copy Operation" was prompted by its collateral relationship with NSA's SHAMROCK.)

D. Department of State

The attorneys for the Government in the case of Morton Halperin, et al., v. Henry A. Kissinger, et al., C.A. No. 1187-73, DDC, advised that in 1969 and 1970-71, [REDACTED] was the subject of electronic surveillances authorized by the Attorney General.

An inquiry was made to ascertain whether the Department of State had conducted any warrantless electronic surveillances since 1969, i.e., since the enactment of Title III. Maurice Leigh, Legal Advisor, Department of State, responded on December 31, 1975 that no warrantless electronic surveillances of U.S. citizens were conducted by his Department during that period. (Tab S)

III. PURPORTED SOURCES OF AUTHORITY FOR INTERCEPTING COMMUNICATIONS

No court orders were obtained to conduct any of the interceptions involved in this inquiry. Justification must be found, it at all, in specific legislation or under the Presidential power to protect the national security or obtain foreign intelligence information deemed essential to the security of the United States. 18 U.S.C. §2511(3).

A. THE PRESIDENTIAL POWER

1. Legislative History

Nothing contained in the criminal prohibitions of 18 U.S.C. §2511(1) or 47 U.S.C. §§501, 605, ". . . shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence." 18 U.S.C. §2511(3).

The legislative history of Section 2511(3) expressly reflects that nothing contained in the Federal criminal prohibitions "... is intended to limit the power of the President to obtain information by whatever means to protect the United States from the acts of a foreign power, including actual or potential attack or foreign intelligence activities, or any other danger to the structure or existence of the Government. Where foreign affairs and internal security are involved, the proposed system of court ordered electronic surveillance envisioned for the administration of domestic criminal legislation is not intended necessarily to be applicable...

"It is obvious that whatever means are necessary should and must be taken to protect the national security interest. Wiretapping and electronic surveillance techniques are proper means for the acquisition of counter-intelligence against the hostile action of foreign powers. Nothing in the proposed legislation seeks to disturb the power of the President to act in this area. Limitations that may be deemed proper in the field of domestic affairs of a nation become artificial when international relations and internal security are at stake." 1968 United States Code Cong. and Adm. News 2156-57, 2182.

2. Presidential Directives (Historical)

Prior to the enactment of 18 U.S.C. §2511(3) in June, 1968, Presidents of the United States since Franklin Roosevelt had authorized Attorneys General to approve investigations to secure information by listening devices directed to the conversation of persons suspected of subversive activities. Zweibon v. Mitchell, 516 F.2d 594, 673-679 App. A (D.C. Cir. 1975).

Although this practice has never received express Supreme Court approval, the Court in United States v. United States District Court,

407 U.S. 297, 310-312, 320 (1972), recognized the constitutional basis of the President's duty to protect the Government against those who would subvert or overthrow it by unlawful means, and noted that the use of electronic surveillance in internal security cases has been sanctioned more or less continuously by various Presidents and Attorneys General since July 1946.

3. Interpretation of the Presidential Power

The operational interpretation of the Presidential power prior to June, 1972, was demonstrated by the Government's argument in the landmark Keith case. United States v. U.S. District Court, 407 U.S. 297, 303, 309 (1972). Relying on 18 U.S.C. §2511(3), the Government contended that Congress, in excepting national security surveillance from the Act's warrant requirement, recognized the President's authority to conduct domestic security electronic surveillance without prior judicial approval, i.e., electronic surveillances of U.S. citizens constituting a threat to domestic security but having no significant connection with a foreign power, its agents or agencies. The Government further argued that such surveillances were conducted primarily for the purpose of collecting and

maintaining intelligence on subversive forces and should not be subject to traditional warrant requirements which were established to govern the investigation of criminal activity rather than ongoing intelligence gathering. 407 U.S. 318-319.

The Court rejected these contentions and held that 18 U.S.C. §2511(3) is not a congressionally prescribed exception to the general warrant requirement, but a congressional disclaimer and expression of neutrality which makes no attempt to define or delineate the powers of the President to meet domestic threats to the national security.

While recognizing the Constitutional basis of the President's domestic security role, the Court ruled that the President's power to authorize domestic security electronic surveillances must be exercised in a manner compatible with the Fourth Amendment which requires an appropriate prior warrant procedure; the prior express approval of the Attorney General is not sufficient.

The Keith case was decided on June 19, 1972. It is a watershed in the development of the applicable law.

Although the Court studiously avoided expressing any opinion concerning the issues which might be involved in the activities of foreign powers or their agents, the decision obviously narrowed the scope of Presidentially-authorized domestic security electronic surveillances previously considered permissible by the Attorney General and Federal intelligence officials.

(Presidential authorization to conduct electronic surveillances solely for the purpose of gathering foreign intelligence information was subsequently upheld by Federal Courts of Appeal, e.g., United States v. Butenko, 494 F.2d 593 (3 Cir. 1974); United States v. Brown, 494 F.2d 418 (5 Cir. 1973)).

The existence of criminal willfulness ~~discovered~~ could turn on whether an electronic surveillance occurred pre-Keith or post-Keith where the surveillance was purportedly under Presidential auspices. The significance of Keith is most apparent where a Federal agency, acting without a warrant but under the purported direction of the President (or his designee, the Attorney General, or alter ego, the National Security Council), intercepts communications having at least one terminal in the United States which communications do not directly relate to national security. Prior to Keith, Presidential authorization was probably sufficient per se to demonstrate good faith on the part of those conducting the interceptions. Since Keith, a finding of good faith in such warrantless surveillances might be more difficult. Zweibon v. Mitchell, 516 F.2d 594, 67ln.279 (D.C. Cir. 1975).

4. Presidential Authorization

The fundamental question in the instant inquiry is whether Presidential authorization, or its equivalent, was given in the aforementioned areas of questionable activity.

Preliminarily, it can be stated that no direct Presidential authorization for any of the interceptions has been found. Rather, the agencies rely variously upon National Security Council Intelligence Directives (NSCIDs), memoranda of conferences with the President, briefings of Attorneys General, instructions from White House staffers, Presidential speeches and press releases, and interpretations of Presidential programs and priorities. These are discussed below under appropriate captions.

B. NARCOTICS INTELLIGENCE-GATHERING: PRESIDENTIAL DIRECTION

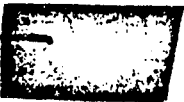
1. Presidential Message to Congress

On July 14, 1969, the President sent the Comprehensive Drug Abuse Prevention and Control Act to Congress. In an accompanying message (Tab T1), the President stated in pertinent part:

... [A] new urgency and concerted national policy are needed at the Federal level to begin to cope with this growing menace to the general welfare of the United States Effective control of illicit drugs requires the cooperation of many agencies of the Federal local and State governments I have directed the Secretary of State and the Attorney General to explore new avenues of cooperation with foreign governments to stop the production of this contraband at its sources Our efforts to eliminate these drugs at their point of origin will be coupled with new efforts to intercept them at their point of illegal entry into the United States In the early days of this Administration I requested that the Attorney General form an interdepartmental Task Force to conduct a comprehensive study of the unlawful trafficking in narcotics and dangerous drugs this Task Force has completed its study and has a recommended plan of action, for immediate and long-term implementation, designed to substantially reduce the illicit trafficking in narcotics, marihuana and dangerous drugs across United States borders. To implement the recommended plan, I have directed the Attorney General to organize and place into immediate operation an "action task force" to undertake a frontal attack on the problem

2. White House Task Force on Narcotics Control

According to CIA memoranda (Tab T2), the CIA "first became involved in the narcotic control problem on 24 October 1969 when the President announced a decision to make narcotics a matter of foreign policy. A White House Task Force on Narcotics Control was established with the DCI as a member and the Agency was asked to contribute to the maximum extent

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possible in the collection of foreign intelligence related to traffic in opium and heroin." (Emphasis added.)

The White House Task Force included representatives from the White House Staff, CIA, State Department, Treasury, BNDD, and the Department of Defense. The purpose of the Task Force was to plan actions abroad to reduce opium production and to suppress trafficking in narcotics. (Tab T3)

According to other CIA memoranda (Tab T4), the President instructed the Director of Central Intelligence to "do whatever he could to help" when he designated him a member of the Task Force.

3. Cabinet Committee on International Narcotics Control

The President sent a memorandum to the Secretary of State on August 17, 1971, (Tab T5), directing the establishment of a Cabinet Committee on International Narcotics Control (CCINC) composed of the Secretaries of State, Defense, and Treasury, the Attorney General, Director of Central Intelligence, and the Ambassador to the United Nations. The President stated that drug abuse had grown to crisis proportions and it was "imperative that the illicit flow of narcotics and dangerous drugs into this country be stopped as soon as possible."

The CCINC was assigned responsibility for the "formulation and coordination of all policies of the Federal Government relating to the goal of curtailing and eventually eliminating the flow of illegal narcotics and dangerous drugs into the United States from abroad. To the maximum

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extent permitted by law, Federal offices and Federal departments and agencies shall cooperate with the Cabinet Committee in carrying out its functions under this directive and shall comply with the policies, guidelines, standards, and procedures prescribed by the Cabinet Committee. ... More specifically, the Cabinet Committee shall . . . (2) assure that all diplomatic, intelligence, and Federal law enforcement programs and activities of international scope are properly coordinated . . . and (5) "report to the President, from time to time, concerning the foregoing." (Emphasis added.)

The Presidential memorandum also directed that the CCINC be supported by a "Working Group to be composed of personnel from each of the concerned agencies . . ."

The CCINC was officially established on September 7, 1971. (Tab T5) Egil Krogh was designated its Executive Director and Chairman of the Working Group. The latter included representatives from State, Treasury, ENDD, NSC, Defense and CIA.

The CCINC appointed a Foreign Intelligence Subcommittee chaired by the CIA "narcotics coordinator" and including members from NSA, DIA, State, Treasury and the White House. (Tab T6) The mission of the Subcommittee was to "provide for a coordinated national effort in the collection, dissemination and finished production of national foreign intelligence on narcotics and dangerous drugs." The functions of the Subcommittee included the forwarding of intelligence "collection requirements as necessary to appropriate departments and agencies."

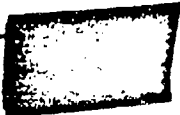
The "Terms of Reference" for the Intelligence Subcommittee define "national foreign intelligence" as follows:

Foreign intelligence includes domestic intelligence that directly relates to foreign intelligence targets. National intelligence is that intelligence which is required for the formulation of national policy or narcotics and dangerous drugs. (Tab T6)

A CCINC Coordinating Subcommittee was also created to "support the President in fulfilling his responsibility" under Section 481 of the Foreign Assistance Act of 1961 which provides:

The President shall suspend sales under the Foreign Military Sales Act... with respect to any country when the President determines that the government of such country has failed to take adequate steps to prevent narcotics drugs and other controlled substances... from ... entering the United States unlawfully... (Tab T7)

In determining whether there was a prima facie case for questioning a country's performance, the Coordinating Subcommittee was to ascertain, inter alia, if there was (1) evidence of substantial violations of treaty obligations or bilateral agreements relating to control of the production, processing or trafficking in narcotics drugs; (2) "hard evidence" that government officials were involved in illicit drug production, processing, smuggling or trafficking; and (3) whether a country had declined or failed to take adequate steps to improve the effectiveness of its narcotics enforcement capability and to correct other narcotics control deficiencies. (Tab T7)

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Minutes and memoranda of CCINC meetings and activities reflect the following: -

August 17, 1971

Establishment of the Cabinet Committee actually amounts to a shift of overall authority away from Justice to the White House and State....

* * *

A Presidential Directive would designate the Cabinet officers to serve on the Committee and mandate its establishment and functions. Also, it would designate me [Krogh] as Executive Director of the Committee. This is important to give the Director [Krogh] credibility and clout.... (Tab T8)

September 20, 1971

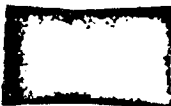
... Mr. Krogh also explained that ways had to be found to make our narcotics suppression effort consistent with the requirements of national security.... (Tab T9)

October 7, 1971

Secretary Rogers stated that he believed the Committee's primary task should be to exert pressure from the top during the next year to insure that the United States Government takes whatever steps are necessary to reduce the supply of illicit narcotics available to American users. He reiterated to the Committee that achieving real progress in this battle is one of the President's highest priorities.

* * *

Attorney General Mitchell raised the problem of narcotics smuggling through Latin America. This area, particularly Panama and Paraguay is an increasingly



important transit point for heroin destined for the United States. Mr. Krogh agreed that the Cabinet Committee should address itself to the Latin American problem on a priority basis. (Tab T10)

December 29, 1971

The Committee agreed with Mr. Krogh's suggestion that the highest supply side priority should be on domestic law enforcement and interdiction at the United States border.

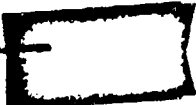
Internationally, the greatest emphases should be on gathering intelligence and on strengthening foreign narcotics law enforcement.

* * *

To increase our intelligence gathering capacity, Mr. Krogh asked for increased assistance from the Central Intelligence Agency. General Cushman responded that the CIA is pleased to act as intelligence coordinator overseas and would attempt to assist the narcotics control effort in whatever way it can. General Cushman did caution, though, that a coordinated interagency effort is required since neither the CIA nor any other narcotics intelligence gathering organization possesses the assets or expertise required to do the job by itself.

General Cushman made it clear that to expand its efforts the CIA needed some increase in financial and personnel support and, most importantly, required additional coverage for its overseas personnel. Mr. Gross volunteered to assist on the latter problem. (Tab T11)

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HANDLE VIA COMINT CHANNELS

March 10, 1972

Mr. Gross asserted that the Cabinet Committee's December 16, 1971, decision to put first priority on intelligence and law enforcement had been interpreted in some quarters as meaning there was no longer any interest in crop substitution, treatment, education or research overseas. The Working Group agreed that this extreme interpretation was incorrect. Other facets of the international drug control effort will continue to receive support where appropriate despite the Cabinet Committee's decision to emphasize intelligence and law enforcement.

* * *

Mr. Ludlum reported on the intelligence review being undertaken at Mr. Krogh's request by his Subcommittee. The Critical Collection Problems Committee of the United States Intelligence Board has been asked by Mr. Ludlum to conduct an inventory of United States overseas narcotics intelligence assets and to make recommendations on a wide range of organizational problems.

* * *

A number of initiatives in the intelligence field have already been taken. The Subcommittee authorized the creation of an ad hoc group to accelerate the collection of high-priority drug intelligence on major European trafficking networks.

The Subcommittee is also analyzing the desirability of a national narcotics operations and intelligence center.

A Treasury sponsored effort to strengthen the intelligence gathering and exchange capability of Interpol ahs also been approved. (Tab T12)

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HANDLE VIA COMINT CHANNELS

March 20, 1972
[Attended by the President]

The President opened the meeting by reiterating his deep commitment to finding a solution to the drug problem and his interest in the activities being conducted by the Cabinet Committee.

Secretary Rogers reported that the Cabinet Committee and its constituent organizations have launched the most comprehensive attack ever made against the international drug traffic. The Secretary congratulated those present on the results to date.

Mr. Krogh then briefed the President on the details of our international narcotics control program. Its objective is to reduce and eventually eliminate the flow of hard narcotics entering the United States from abroad.... Present priorities for achieving this objective are the following....:

2. Improved overseas law enforcement and intelligence.

* * *

The problem of narcotics intelligence was next discussed.

Mr. Krogh described intelligence as being the most important, but currently weakest, element of our international drug control program. We have yet to penetrate the upper echelons of major overseas syndicates, have comparatively little hard intelligence on officials collusion, and need more precise information on specific narcotics shipments.

There was general agreement that some mechanism should be developed to ensure better coordination, collection, analysis, and dissemination of narcotics intelligence.

* * *

In the President's opinion, if a nation resigns itself to living with drugs, it risks destruction of all accepted values.

The President restated his conviction that the best approach to the drug problem is to offer assistance and treatment to the addict combined with the strictest possible enforcement directed against suppliers and traffickers. (Tab T13)

August 30, 1972

... Next discussed were procedures for use in conducting investigations required by Section 481 of the Foreign Assistance Act and related statutes which require the President to cut off aid to countries not cooperating on narcotics control.

* * *

Mr. Gross then described his recent mission to Paraguay where he discussed the extradition of Auguste Ricord with President Stroessner. Mr. Gross' success was applauded by members of the Committee.

Mr. Krogh cautioned that our public comments on the United States role in the Ricord matter should be guarded lest the decision favoring extradition be reversed or our relations with Paraguay subjected to further unnecessary strain. He also asked that appropriate steps be taken to prevent Ricord from being released on bail once he is in United States custody. Director Ingersoll replied that efforts were already underway to try to prevent bail from being set.

Once Ricord arrives in the United States, it is unclear how quickly he can be brought to trial. The Attorney General agreed to look into the possibility of expediting judicial consideration of the case. (Tab T14)

~~TOP SECRET~~ [REDACTED]

November 27, 1973
[Attended by the President]

The President opened the meeting by citing the Administrations record of progress in combatting heroin abuse and emphasized the continuing priority which he intends the drug control program to have.

The President expressed his pleasure with the successes our drug enforcement efforts have had, both at home and abroad....

* *

... He asked the Cabinet to give new impetus to the attack on newly emerging problem areas and to do an even better job in combatting the old....

* * *

The President emphasized that he wanted to continue his personal involvement in drug control as appropriate and instructed Mr. Laird to assume personal responsibility for overseeing the operation of the federal anti-drug effort.... (Tab T15)

In a telephone interview on April 13, 1976, Egil Krogh advised that in 1971, a White House meeting of high-level presidential advisers was opened to ABC-TV News during which President Nixon was briefed by DCI Richard Helms and BNDD Director John Ingersoll on the problem of narcotics (particularly heroin) smuggling into the United States. An ABC-TV News Documentary containing excerpts from the White House meeting was produced and later published in the paperback, A. WESTIN, HEROES AND HEROIN (1972). (Tab T15a) Krogh advised that the President was very interested in appropriately utilizing all CIA assets abroad to assist the effort to interdict narcotics destined for the United States. Krogh also vaguely recalled hearing of intercepted radio-telephone communications containing narcotics intelligence but was unaware of the mechanics or specific agencies involved in such interceptions.

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HANDLE VIA COMINT

In a March 28, 1971 memorandum to the CIA Narcotics Coordinator (Tab T5a), CCINC Executive Director Egil Krogh stated that CIA station chiefs needed to be reminded that their role in narcotics intelligence collection overseas was an active role: "They are not simply to support whatever initiatives BNDD already has underway. They should also be instructed that headquarters wants them (1) to penetrate the major hard drug collection, refining and distribution networks, and (2) to discover which foreign government and police officials are protecting or assisting the traffickers."

4. Office of National Narcotics Intelligence

On July 27, 1972, the President issued Executive Order 11676 "[P]roviding for the Establishment of an Office of National Narcotics Intelligence Within the Department of Justice". The Order states in pertinent part:

This Administration is determined to eradicate the menace of drug abuse in America.... I have now determined that a National Narcotics Intelligence System is a necessary next step in our campaign against illegal drug traffic... The Director shall call upon other agencies of the Government to provide him with information, and such agencies shall, to the extent permitted by law, provide the Director with all information that is pertinent to the development and maintenance of a National Narcotics Intelligence System.... Each department and agency of the Federal Government shall, upon request and to the extent permitted by law, assist the Director of the Office of National Narcotics Intelligence in the performance of functions assigned to him by or pursuant to this order, and the Director may, in carrying out those functions, utilize the services of any other agencies, Federal or State, or may be available and appropriate. (Tab T16)

On December 6, 1972, the Attorney General sent a memorandum to the various department and agencies, including the NSA, prescribing the role and mission of the ONNI pursuant to the above Order. (Tab T17) The

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Attorney General stated that "[g]iven the urgency of the narcotics problem and the priority placed by the President upon the establishment of a National Narcotics Intelligence System to combat it, it is essential that the responsible departments and agencies involved join forces in an integrated program of action..."

5. International Narcotics Control Conference

On September 18, 1972, in remarks to the International Narcotics Control Conference the President said in pertinent part:

[W]inning the battle against drug abuse is one of the most important, the most urgent national priorities confronting the United States today [L]ooking back over the three years since I declared total war on drug abuse and labeled it America's public enemy number one, I think the depth of our national commitment is clear From an organizational standpoint, we have mobilized to meet this problem on all fronts I have named a Cabinet Committee on International Narcotics Control which coordinates our world-wide campaign to cut off the sources of supply Here we are attacking the problem therefore on all fronts in the most effective way we can through our various government agencies I also have assumed some personal responsibilities. I have been deliberately cracking the whip, as many of you in this room know, in my personal supervision of this program and I have to admit that we have knocked some bureaucratic heads together because of my directive, which I gave in the East Room two years ago, that government agencies should quit fighting each other about this problem and start fighting the problem Nor will this effort stop at our own borders. The men and women who operate the global heroin trade are a menace not to Americans alone, but to all mankind They must be permitted not a single hiding place or refuge from justice anywhere in the world and that is why we have established an aggressive international narcotics control program in cooperation with the governments in more than 50 countries around the world. That is why I have

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ordered the Central Intelligence Agency, early in this Administration, to mobilize its full resources to fight the international drug trade, a task, incidentally, in which it has performed superbly.... The key priority here is the target on the traffickers wherever they are, to immobilize and destroy them through our law enforcement and intelligence efforts and I commend all of you on the fine initial progress which has been made in these programs... Any government whose leaders participate in or protect the activities of those who contribute to our drug problem should know that the President of the United States is required by statute to suspend all American economic and military assistance to such a regime.... I consider keeping dangerous drugs out of the United States just as important as keeping armed enemy forces from landing in the United States. Dangerous drugs which come into the United States can endanger the lives of young Americans just as much as would an invading army landing in the United States. Every government which wants to move against narcotics should know that it can count on this country for our wholehearted support and assistance in doing so.... We are living in an age, as we all know, in the era of diplomacy, when there are times that a great nation must engage in what is called a limited war. I have rejected that principle in declaring total war against dangerous drugs.... We are going to fight this evil with every weapon at our command..." (Tab T18) (Emphasis added.)

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6. Pronouncements by President Ford

In a September, 1975, White Paper on Drug Abuse the Domestic Council Drug Task Force quoted President Ford as having recently stated:

All nations of the world--friend and adversary alike--must understand that America considers the illicit export of opium to this country a threat to our national security * * * Secretary Kissinger and I intend to make sure that they do [understand].
(Tab T19) (Emphasis added.)

A CIA memorandum of September 8, 1975, states:

... [T]he President, in compliance with the amendments to the Foreign Assistance Act of 1961... has determined that the Agency should engage in the collection of narcotics intelligence abroad. In a paper entitled "Findings Pursuant to Section 662 of the Foreign Assistance Act of 1961, as Amended, Concerning Operations Abroad to Help Implement Foreign Policy and Protect National Security," the President, in January 1975, found that the world-wide activity to "covertly influence foreign personalities to assist in programs aimed at... international narcotics traffic... directed against the United States" is important to the national security of the United States. (Tab T20) (Emphasis added.)

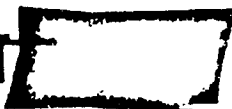
~~TOP SECRET~~ [REDACTED]

C. GENERAL INTELLIGENCE GATHERING: PRESIDENTIAL DIRECTION

On November 5, 1971, the President sent a memorandum (reportedly prepared by James Schlesinger, then of OMB) to the intelligence principals of the U.S. Government (Tab U1) establishing goals for the intelligence community and directing organizational and management changes to attain them. One of the listed objectives was that "... more efficient use of resources by the [intelligence] community in the collection of intelligence information be achieved. Utilization of the means available must be in consonance with approved requirements of U.S. security and national interests." (Emphasis added.)

To achieve the objectives, the President directed, inter alia, that the Director of Central Intelligence (DCI) assume overall leadership of the intelligence community; that intelligence collection programs financed and managed by the Department of Defense [which includes NSA] must come under more effective management and coordination with other intelligence programs; and that NSCIDs and DCIDs (Director of Central Intelligence Directives) be rewritten to reflect the changes ordered.

The President "reconstituted" the United States Intelligence Board (USIB) under the chairmanship of the DCI and added to its membership a representative of the Secretary of the Treasury. The USIB was charged with advising and assisting the DCI with respect to the "production of national intelligence requirements and priorities, the supervision of the dissemination and security of intelligence material, and the protection of intelligence sources and methods."

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The President further established a National Security Council Intelligence Committee (NSCIC) to give direction and guidance on national substantive intelligence needs, and also directed the Department of Defense to establish a "unified National Cryptologic Command under Director, NSA for the conduct of USG communications intelligence and electronic intelligence activities."

In conclusion, the President stated that while his directed changes were limited, he fully expected "further changes in the intelligence community consistent with maximum practicable attainment of my objectives" and that other "changes in the consumer-producer relationship may be needed to achieve a more effective reconciliation of the demands from consumers with the limited resources available for intelligence production."

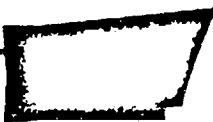
The principal items in the foregoing memorandum were made public in a contemporaneous White House press release. (Tab U2) On the same date, the President sent a letter to the DCI (Tab U3) in which he designated, as a top priority, the production of "national intelligence required by the President and other national consumers". The President also enumerated the following goals: (1) a more efficient use of resources in the collection of intelligence information; (2) a more effective assignment of functions within the intelligence community; and (3) improvement in the quality and scope of the substantive product.

The President's directives were incorporated in NSCIDs effective February 17, 1972.

On October 9, 1974, in a memorandum to the DCI, President Ford affirmed

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"the responsibilities and authority charged to you as leader of the Intelligence Community in the Presidential memorandum of November 5, 1971... I shall expect that the heads of the departments having foreign intelligence responsibilities will cooperate with you and provide you with every assistance in fulfilling your responsibilities."

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D. NARCOTICS INTELLIGENCE GATHERING: LEGISLATIVE DIRECTION

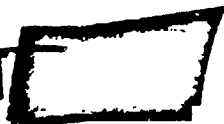
The Federal Narcotics and Drug Abuse Law Enforcement Reorganization Act of 1973 (5 U.S.C. §§901 et seq.) contains Congressional findings and declarations of policy (Tab V) which acknowledge both the need for sharing narcotics intelligence and the fact that the Director of Central Intelligence (CIA) and Secretary of Defense (NSA) have functions related to the trafficking in narcotics and dangerous drugs:

Sec. 3.(a) The Congress hereby finds and declares...
(3) that overlapping jurisdictions, failure to share intelligence and other information, general lack of communication and cooperation... among law enforcement agencies have resulted from the diffusion of efforts within the Federal government against trafficking in narcotics and dangerous drugs;

* * *

Sec. 10.(a) The President, after consultation with the Attorney General, shall direct the Director of the Central Intelligence with respect to all of the Director's functions related to trafficking in narcotics and dangerous drugs;

Sec. 11.(a) The President, after consultation with the Attorney General, shall direct the Secretary of Defense with respect to all of the Secretary's functions related to trafficking in narcotics and dangerous drugs.

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HANDLE VIA COMINT CHANNELS

E. CIA: LEGISLATIVE AND PRESIDENTIAL AUTHORIZATION

1. National Security Council

Congress established the National Security Council in 1947 to advise the President with respect to the integration of domestic, foreign, and military policies relating to national security. Its membership includes the President (as presiding officer), the Vice President, the Secretaries of State and Defense, et al. 50 U.S.C. §402.

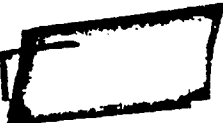
2. Central Intelligence Agency

The Central Intelligence Agency (CIA) and the position of Director of Central Intelligence (DCI) were also established by the National Security Act of 1947 (50 U.S.C. §401, et seq.) to operate under the direction of the National Security Council for the purpose of "coordinating the intelligence activities of the several Governmental departments and agencies in the interests of national security."

The statutory responsibilities of the Central Intelligence Agency include the duty to advise the National Security Council and make recommendations regarding national security intelligence activities, the coordination of such activities, the dissemination within the Government of intelligence relating to national security, and the performance of such other functions and duties as the National Security Council may direct. 50 U.S.C. §403(d).

3. NSCIDs

The statutory authority of the National Security Council to direct the activities of the CIA and the Director of Central Intelligence is

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HANDLE VIA COMINT CHANNELS

implemented by the issuance of National Security Council Intelligence Directives (NSCIDs). These NSCIDs are deemed by CIA to bear the imprimatur of the President who has the only "vote" on the Council.

The NSCIDs which prescribe the basic duties and responsibilities of the CIA and the Director of Central Intelligence during the time period here involved are NSCID 1 revised 3/4/64, and NSCID 1 effective 2/17/72, NSCID 5 revised 1/18/61, and NSCID 5 effective 2/17/72.

NSCID 1, March 4, 1964

NSCID 1, revised March 4, 1964 (and in effect until February 17, 1972), directs that the Director of Central Intelligence "shall coordinate the foreign intelligence activities of the United States in accordance with existing law and applicable National Security Council directives".

The 1964 NSCID 1 further provides that the Director of Central Intelligence "shall act for the National Security Council to provide for detailed implementation of National Security Council Intelligence Directives by issuing with the concurrence of the U.S. Intelligence Board such supplementary Director of Central Intelligence Directions as may be required... Such directions shall, as applicable, be promulgated and implemented within the normal command channels of the departments and agencies concerned". (Paragraph 3a)

The contemplated DCI Directives include:

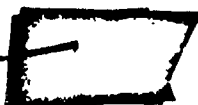
- (1) General guidance and the establishment of specific priorities for the production of national and other intelligence and for collection and other activities in support thereof, including:
 - (a) establishment of comprehensive National Intelligence Objectives generally applicable to foreign countries and areas;

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- (b) identification from time to time, and on a current basis, of Priority National Intelligence Objectives with reference to specific countries and subjects; and (c) issuance of such comprehensive and priority objectives, for general intelligence guidance, and their formal transmission to the National Security Council.
- (2) Establishment of policy, procedures and practices for the maintenance, by the individual components of the intelligence community, of a continuing interchange of intelligence, intelligence information, and other information with utility for intelligence purposes.
- (3) Establishment of policy, procedures and practices for the production or procurement, by the individual components of the intelligence community within the limits of their capabilities, of such intelligence, intelligence information and other information with utility for intelligence purposes relating to the national security, as may be requested by one of the departments or agencies. (Paragraph 3g)

The 1964 NSCID 1 directs that the Director of Central Intelligence disseminate "national intelligence" (i.e., intelligence required for the formulation of national security policy and concerning more than one department or agency) to the President, members of the National Security Council, members of the USIB and, subject to existing statutes, to such other components of the Government as the NSC "may from time to time designate or the U.S. Intelligence Board may recommend." (Paragraph 4)

The DCI was also directed to "call upon the other departments and agencies as appropriate to ensure that on intelligence matters affecting the national security the intelligence community is supported by the full

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knowledge and technical talent available in or to the Government." (Paragraph 6).

NSCID 1, February 17, 1972

NSCID 1 (and other NSCIDs) were revised on February 17, 1972, to conform with the directives of the President contained in a November 5, 1971 Presidential memorandum, *infra*.

The 1972 NSCID 1 charged the Director of Central Intelligence with, inter alia, the following duties and responsibilities:

3. The Director of Central Intelligence

- a. The Director of Central Intelligence will discharge four major responsibilities:
 - (1) Planning, reviewing and evaluating all intelligence activities and the allocation of all intelligence resources.
 - (2) Producing national intelligence required by the President and other national consumers.
 - (3) Chairing and staffing all intelligence community advisory boards and committees.
 - (4) Establishing and reconciling intelligence requirements and priorities within budgetary constraints.

* * *

- c. The Director of Central Intelligence shall act for the National Security Council to provide for detailed implementation of National Security Council Intelligence Directives by issuing, after appropriate

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consultation, such supplementary Director of Central Intelligence Directives as may be required. Such directives shall, as applicable, be promulgated and implemented within the normal command channels of the departments and agencies concerned.

* * *

- g. Director of Central Intelligence Directives to be issued in accordance with the provisions of subparagraph c above shall include:

- (1) General guidance and the establishment of specific priorities for the production of national and other intelligence and for collection and other activities in support thereof and their formal transmission to the National Security Council.
- (2) Establishment of policy, procedures and practices for the maintenance, by the individual components of the intelligence community, of a continuing interchange of intelligence, intelligence information and other information, information with utility for intelligence purposes.

* * *

5. The United States Intelligence Board (USIB)

* * *

- c. The Board shall be provided with a Secretariat staff, which should be under the direction of an Executive Secretary appointed by the Director of Central Intelligence. Subordinate committees and Working Groups should be established, as appropriate, by the Director of Central Intelligence.

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- 6. National Intelligence

* * *

- d. The Director of Central Intelligence shall disseminate national intelligence to the President, members of the National Security Council, as appropriate, members of the United States Intelligence Board and, subject to existing statutes, such other components of the Government as the National Security Council may from time to time designate or the United States Intelligence Board may recommend....

* * *

7. Protection of Intelligence and of Intelligence Sources and Methods.

The Director of Central Intelligence, with the advice of the members of the United States Intelligence Board, shall ensure the development of policies and procedures for the protection of intelligence and of intelligence sources and methods from unauthorized disclosure. Each department and agency shall remain responsible for the protection of intelligence and of intelligence sources and methods within its own organization....

* * *

8. Community Responsibilities

- a. In implementation of, and in conformity with, approved National Security Council policy, the Director of Central Intelligence shall:

* * *

- (2) Call upon the other departments and agencies, as appropriate, to ensure that on intelligence matters affecting the national security the intelligence community is supported by the full knowledge and technical talent available in

or to the Government.

* * *

- (5) Make arrangements with the departments and agencies for the assignment to, or exchange with, the Central Intelligence Agency of such experienced and qualified personnel as may be of advantage for advisory, operational or other purposes. In order to facilitate the performance of their respective intelligence missions, the departments and agencies concerned shall, by agreement, provide each other with such mutual assistance as may be within their capabilities and as may be required in the interests of the intelligence community for reasons of economy, efficiency or operational necessity. In this connection primary departmental interests shall be recognized and shall receive mutual cooperation and support.

* * *

- (6) Be provided with all information required from all departments and agencies of the Executive Branch required for the exercise of his responsibilities.

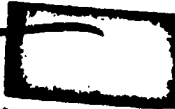
b. Insofar as practicable, in fulfillment of their respective responsibilities for the production of intelligence, the several departments and agencies shall not duplicate the intelligence activities and research of other departments and agencies and shall make full use of existing capabilities of the other elements of the intelligence community.

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in the CIA's statutory procurement power, i.e., 50 U.S.C. §403j, which authorizes the CIA, inter alia, to expend funds for radio equipment and devices, and contractual services otherwise provided by law or regulations when approved by the DCI. In addition, NSCID 1 charges the Director of Central Intelligence with the protection of intelligence and intelligence sources and methods.

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5. CIA Narcotics Intelligence Gathering

In a memorandum of August 6, 1975 (Tab W), CIA General Counsel invokes two principal sources of CIA authority to collect narcotics intelligence: 50 U.S.C. §403(d), and NSCID 5.

Section 403(d)(3) charges CIA with the duty, under the direction of the National Security Council:

... to correlate and evaluate intelligence relating to national security, and provide for the appropriate dissemination of such intelligence within the Government using where appropriate existing agencies and facilities; Provided, that the Agency shall have no police, subpoena, law-enforcement powers, or internal-security functions.

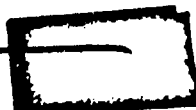
CIA asserts that the above clause is clearly "self-executing regarding the correlation and evaluation tasks of the Agency's narcotics program. Although these tasks must comply with the 'direction of the National Security Council', if any, no further authorization is required regarding this part of the program; the statute is sufficient..."

CIA finds authority to conduct the non-correlation on non-evaluation tasks in a combination of Section 403(d)(4) and NSCID 5.

Since 1958, NSCID 5 has delegated primary responsibility to the CIA for U.S. clandestine activities abroad, including:

3a. The conduct of espionage outside the United States and its possessions [defined as "that intelligence activity which is directed toward the acquisition of information through clandestine means"] in order to meet the intelligence needs of all departments and agencies concerned in connection with the national security.

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3c. Upon request and to the extent practicable, to assist other departments and agencies with their cover support needs. [The latter was changed to "cover and support" in the NSCID 5 effective 2/17/72].

Section 403(d)(4), Title 50, authorizes the CIA:

To perform, for the benefit of the existing intelligence agencies, such additional services of common concern as the National Security Council determines can be more efficiently accomplished centrally.

CIA contends that NSCID 5 is clearly within the scope of Section 402(d)(4), and that the collection of foreign narcotics intelligence is, in turn, within the scope of NSCID 5.

CIA General Counsel further notes that in July, 1973, William E. Colby testified before the Senate Armed Services Committee on his nomination to become Director of Central Intelligence. In response to a question specifically addressed to whether CIA was then engaged in assisting U.S. law enforcement agencies in addition to the F.B.I., Mr. Colby replied:

Answer. Yes. CIA disseminates its foreign intelligence reports to several agencies concerned with the matters covered in these reports such as the Drug Enforcement Administration, the Immigration and Naturalization Service, the Armed Services, the Customs Service, the Secret Service and others on a routine basis.

The CIA reports there was no congressional objection to the dissemination of such intelligence to law-enforcement agencies, and construes this as tacit approval by Congress of such dissemination.

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HANDLE VIA COMINT CHANNELS

F. NSA: LEGISLATIVE AND PRESIDENTIAL AUTHORIZATION

1956
The National Security Agency was established under the authority and control of the Secretary of Defense by Presidential directive of November 4, 1952 pursuant to the provisions of Section 133, Title 10, United States Code. The organizational structure and functions of NSA are set forth in National Security Council Intelligence Directive No. 9, as revised 12/29/52 and superceded by National Security Council Directive No. 6 issued 2/17/72.

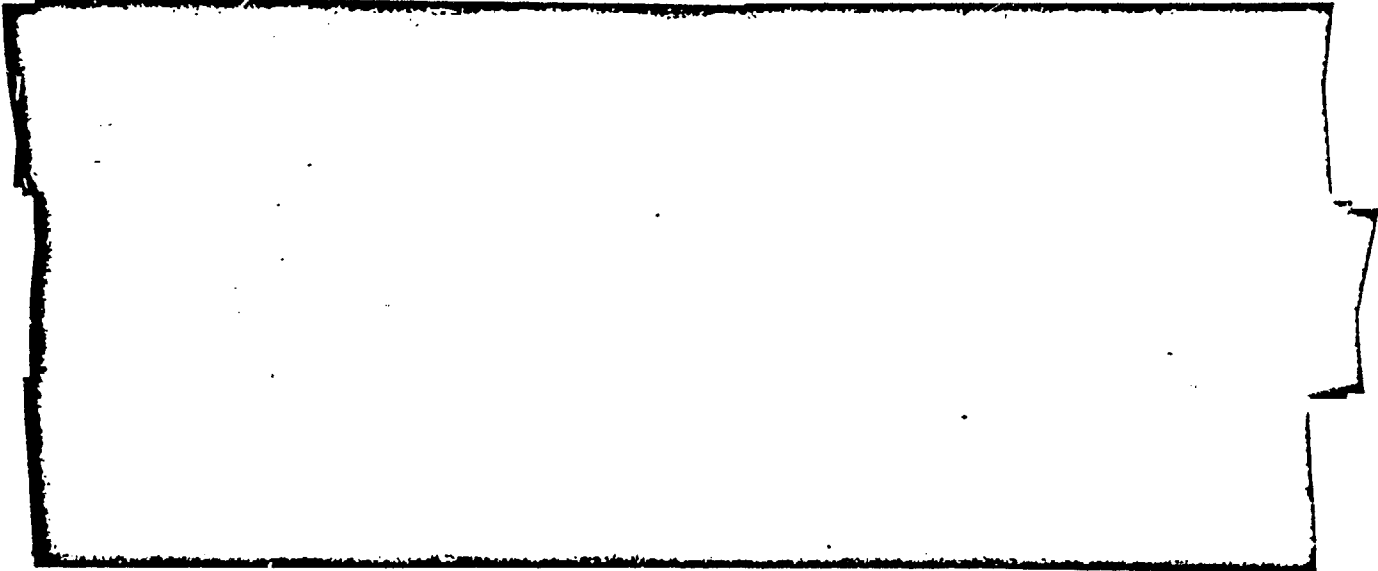
Prior to the establishment of NSA, Congress had enacted 18 U.S.C. §798 which prohibits disclosure to unauthorized persons of classified information including, inter alia, the nature or use of any code, cipher or cryptographic system of the United States or information concerning the communication intelligence activities of the United States.

The term "communication intelligence" is defined by Section 798 to include "all procedures and methods used in the interception of communications and the obtaining of information from such communications by other than the intended recipients."

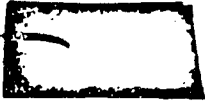
The statute describes "unauthorized person" as any person who, or agency which, is not authorized to receive the information by the President or the "head of a department or agency which is expressly designated by the President to engage in communication intelligence activities for the United States." (Emphasis added.)

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By the enactment of 18 U.S.C. §798, Congress recognized the legitimacy and protected the product of communications intelligence activities of the United States, notwithstanding the prohibitions of 47 U.S.C. §605 enacted in 1934. Section 798 also confirms the Presidential power to designate an agency, i.e., the National Security Agency, to engage in communications intelligence activities for the United States.



The foregoing statutes, together with 18 U.S.C. §2511(3), clearly acknowledge the President's power to engage the National Security Agency in communications intelligence activities. The specific questions in the instant inquiry are whether Presidential authorization, or its equivalent, was given in each area of questionable NSA activity; and if so, whether NSA exceeded that authorization. The answers will turn largely on the operational definition of "communication intelligence activities," as opposed to the sweeping statutory definition in 18 U.S.C. §798(b).

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1. Communications Intelligence

NSA operates pursuant to the definition of communications intelligence (COMINT) contained in National Security Council Intelligence Directive No. 6, i.e., intelligence information derived by other than the intended recipients from foreign communications passed by radio, wire or other electromagnetic means. This encompasses the processing of foreign encrypted communications (including the study of plain text), however transmitted, but does not include the interception and processing of unencrypted written communications. NSCID 6, Paragraph 1. ~~(Citation: NSCID 6, Paragraph 1)~~

2. NSCIDs

NSA takes the position that the President's constitutional and statutory authority to obtain communications intelligence is implemented through the directives (NSCIDs) of his alter ego, the National Security Council, and the subsidiary directives of the Director of Central Intelligence (DCIDs and supplemental CISRs).

Congress established the National Security Council in 1947 and designated its membership to include the President (as presiding officer), the Vice President, Secretaries of State and Defense, et al. The primary function of the Council is to advise the President with respect to the integration of domestic, foreign, and military policies relating to national security. 50 U.S.C. §402.

It is a truism that the President has the only "vote" on the National Security Council. Consequently, the operational directives (NSCIDs) of the Council are regarded by NSA as bearing the imprimatur of the President.

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(While the President does not attend every NSC meeting, the NSCIDs distributed to the field obviously do not reflect the President's attendance record nor the extent of his personal participation in the promulgation of any particular directive.)

NSCID 6, effective February 17, 1972, provides in pertinent part:

3. The Secretary of Defense

- a. The Secretary of Defense is designated as Executive Agent of the Government for the conduct of SIGINT* activities in accordance with the provisions of this directive and for the direction, supervision, funding, maintenance and operation of the National Security Agency. The Director of the National Security Agency shall report to the Secretary of Defense and shall be the principal SIGINT adviser to the Secretary of Defense, the Director of Central Intelligence, and the Joint Chiefs of Staff. The Secretary of Defense may delegate in whole or part authority over the Director of the National Security Agency within the Office of the Secretary of Defense.

* * *

4. The National Security Agency

* * *

- b. It shall be the duty of the Director of the National Security Agency to provide for the SIGINT mission of the United States, to establish an effective unified organization and control of all SIGINT collection and processing activities of the United States, and to produce SIGINT in accordance with objectives, requirements and priorities established by the Director of Central Intelligence Board. No other organization

*NSCID 6 defines SIGINT to include communications intelligence (COMINT).

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shall engage in SIGINT activities except as provided for in this directive.

- c. Except as provided in paragraphs 5 and 6 of this directive, [re unique responsibilities of CIA and FBI] the Director of the National Security Agency shall exercise full control over all SIGINT collection and processing activities,

[REDACTED]

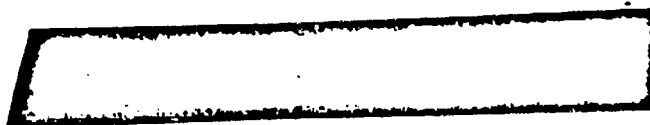
The Director of the National Security Agency is authorized to issue direct to any operating elements engaged in SIGINT operations such instructions and assignments as are required. All instructions issued by the Director under the authority provided in this paragraph shall be mandatory, subject only to appeal to the Secretary of Defense.

* * *

- e. The Armed Forces and other departments and agencies often require timely and effective SIGINT. The Director of the National Security Agency shall provide information requested, taking all necessary measures to facilitate its maximum utility. As determined by the Director of the National Security Agency or as directed by the Secretary of Defense, the Director of the National Security Agency shall provide such SIGINT

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- g. The intelligence components of individual departments and agencies may continue to conduct direct liaison with the National Security Agency in the interpretation and amplification of requirements and priorities within the framework of objectives, requirements and priorities established by the Director of Central Intelligence. (Emphasis added.)

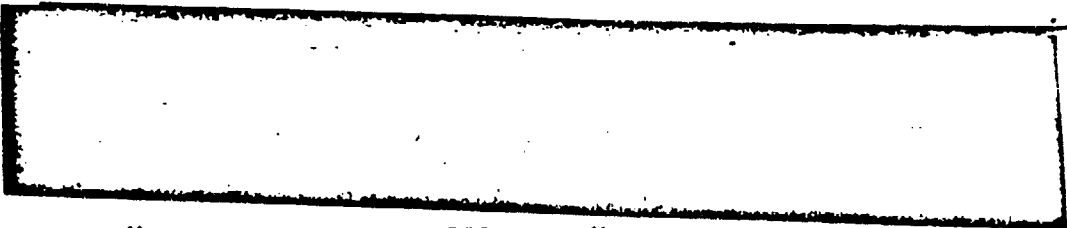
NSCID 9 July
" 9 Dec
NSCID 6 July
" 6 Jan
" 6 Feb

The foregoing NSCID 6 superceded NSCID 6 dated September 15, 1958 and revised January 18, 1961 which, in turn, superceded NSCID 9 dated July 1, 1948 and revised December 29, 1952. There has been no fundamental change since September 15, 1958 in the definitions and duties set forth in pertinent part above. Paragraph 4b is a rephrasing of the old Paragraph 6; Paragraph 4e of old Paragraph 7c; and Paragraph 4c of the old 7a.

Prior to the issuance of NSCID 6 on September 15, 1958, its predecessor, NSCID 9, dated July 1, 1948, contained the following definitions:

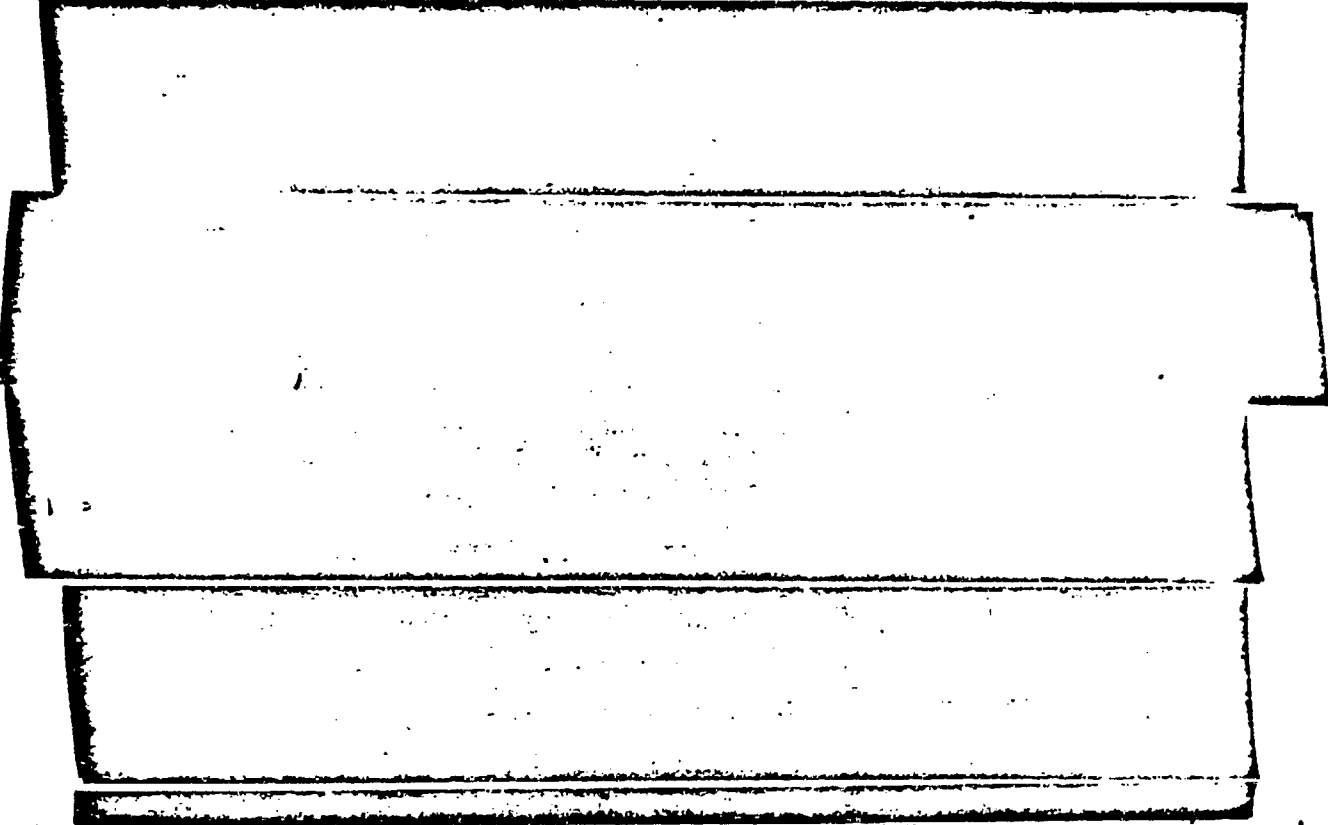
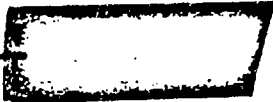


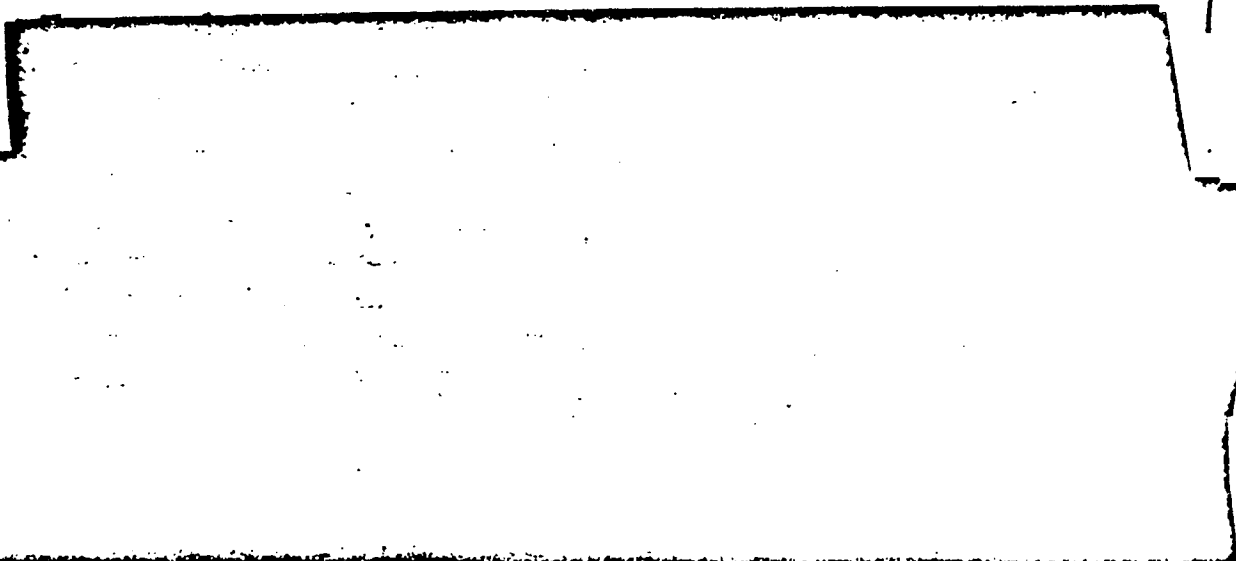
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"Communications Intelligence" is intelligence produced by the study of foreign communications. Intelligence based in whole or in part on Communications Intelligence sources shall be considered Communications Intelligence as pertains to the authority and responsibility of the United States Communications Intelligence Board.

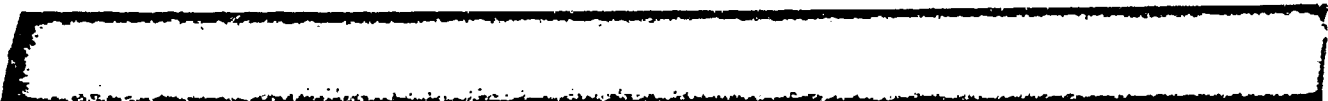
"Communications Intelligence activities" comprise all processes involved in the collection, for intelligence purposes, of foreign communications, the production of information from such communications, the dissemination of that information, and the control of the protection of that information and the security of its sources.

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3. The One-Terminal Rule

The foregoing definition of "foreign communications" is only slightly less sweeping than the definitions of "communications intelligence" in NSCID 6 and 18 U.S.C. §798. NSA purportedly operates, however, pursuant to a more restrictive self-imposed "one-terminal rule", i.e., NSA will not intentionally intercept a communication unless at least one terminal is outside the United States. According to Dr. Louis Tordello, former Deputy Director of NSA, this has been NSA's practice from its inception in 1952 



To further confirm its good faith reliance on the one-terminal rule, NSA cites memoranda reflecting separate briefings of Attorney General John Mitchell and Secretary of Defense Melvin Laird on February 1, 1971, by Assistant NSA Director B.K. Buffham. (Tab X1) Mr. Buffham's memorandum

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HANDLE VIA COMINT CHANNELS

of February 3, 1971 reflects that Messrs. Mitchell and Laird read and approved the contents of the following January 26, 1971 memorandum from NSA Director Admiral Noel Gaylor:

26 January 1971

MEMORANDUM FOR THE SECRETARY OF DEFENSE
THE ATTORNEY GENERAL

SUBJECT: NSA Contribution to Domestic Intelligence

Consistent with our conversation today, these are the agreed ground rules on NSA contribution to intelligence bearing on domestic problems.

Character

To be consistent with accepted standards in respect to protection of individual constitutional rights and civil liberties.

Source

Telecommunications with at least one foreign terminal.

Scope

Intelligence bearing on:

- (1) Criminal activity, including drugs.
- (2) Foreign support or foreign basing of subversive activity.
- (3) Presidential and related protection.

Procedures

Tasking by competent authority only.

Special procedures to protect source, to include:

- (1) Compartmented reporting to F.B.I. or ENDD for criminal activity, to F.B.I. and CIA for foreign-related subversive activity, and to the Secret Service for Presidential protection.
- (2) No indications of origin.
- (3) No evidential or other public use under any circumstances.
- (4) Screening at source (NSA) to insure compliance with the above criteria.

It is further understood that NSA will insure full availability of all relevant SIGINT material by competent and informed representation in the Justice working group. (Emphasis added.)

/s/ Noel Gaylor

Another memorandum from Admiral Gaylor attached to the above memorandum of January 26, 1971, stated that the latter was read "in presence of Secy. Laird and accepted by Attorney General Kleindienst 1 July 1972". (Tab X2)

Mr. Kleindienst had no independent recollection of the above but said he would not dispute Admiral Gaylor's representation. (Tab X3)

Mr. Laird stated he never saw or read Admiral Gaylor's memorandum but couldn't disagree with Buffham's comments, and that the memorandum contained nothing he did not generally know as early as 1964 when he served on the House Armed Forces Appropriations Subcommittee. (Tab X4)

Mr. Mitchell said he had no recollection of the briefing by Buffham but that his appointment book reflects a meeting with Buffham at 12:05 p.m. on February 1, 1971 for about five minutes. (Tab X5)

(In addition to the foregoing, NSA relies on other instructions and directions to support its intelligence gathering activities concerning narcotics traffic, militants, radicals, etc. These will be discussed, infra, under appropriate captions).

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4. NSA Participation In Drafting 18 U.S.C. 2511(3)

[Having operated under the "one-terminal rule" since 1952,] NSA's General Counsel consulted in 1967 with officials of both the Justice Department and the Senate Subcommittee who were drafting Federal legislation prohibiting unauthorized interceptions of wire and oral communications (18 U.S.C. §§2510, et seq.). To assure that NSA's operations would not be affected by the legislation, NSA General Counsel participated in the drafting of 18 U.S.C. §2511(3) which was incorporated in the statute enacted on June 19, 1958. (Y 1)

On July 24, 1968, the General Counsel reported to NSA that the effect of the Presidential exception contained in 18 U.S.C. §2511(3) ["... is to remove any doubt aⁿ to the legality of the SIGINT and COMSEC activities of the Executive Branch of the Government." He further stated that the language "... precludes an interpretation that the prohibitions against wiretapping or electronic surveillance techniques in other law applies to SIGINT and COMSEC activities of the Federal Government.] Wiretapping and electronic surveillance techniques, are, therefore, legally recognized as means for the Federal Government to acquire foreign intelligence information and to monitor U.S. classified communications to assess their protection against exploitation by foreign intelligence activities." (Tab Y2)

NSA General Counsel sought, in his initially proposed draft of 18 U.S.C. §2511(3), to insure that no information obtained in the exercise of such Presidential powers "shall be received in evidence in any judicial or administrative proceeding." (Tab Y3) This proposal was

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substantially diluted in the statute, as passed, and was essentially nullified by the enactment of 18 U.S.C. §3504 on October 15, 1970.

5. Propriety of Requirements

It should be noted that Paragraph 7c of the 1958 NSCID 6 provided:

... It is recognized that the Armed Forces and other departments and agencies being served require direct COMINT... support of various kinds.... Each member department or agency is responsible for stating to the Director, NSA its requirements for direct support. (Emphasis added.)

The rephrased Paragraph 4e of NSCID 6, effective 2/17/72, provides:

The Armed Forces and other departments and agencies often require timely and effective SIGINT. The Director of the National Security Agency shall provide information requested... (Emphasis added.)

NSA interprets this language to require the implicit assurance of the departments or agency making requests to NSA that such requests are appropriate. NSA thus purportedly places the responsibility on the requesting agencies to frame their requirements to conform with the law.

Paragraph 4g of NSCID 6 (2/17/72) permits the intelligence components of individual departments and agencies to "continue to conduct direct liaison with the National Security Agency in the interpretation and amplification of requirements and priorities within the framework of objectives, requirements and priorities established by the Director of Central Intelligence."

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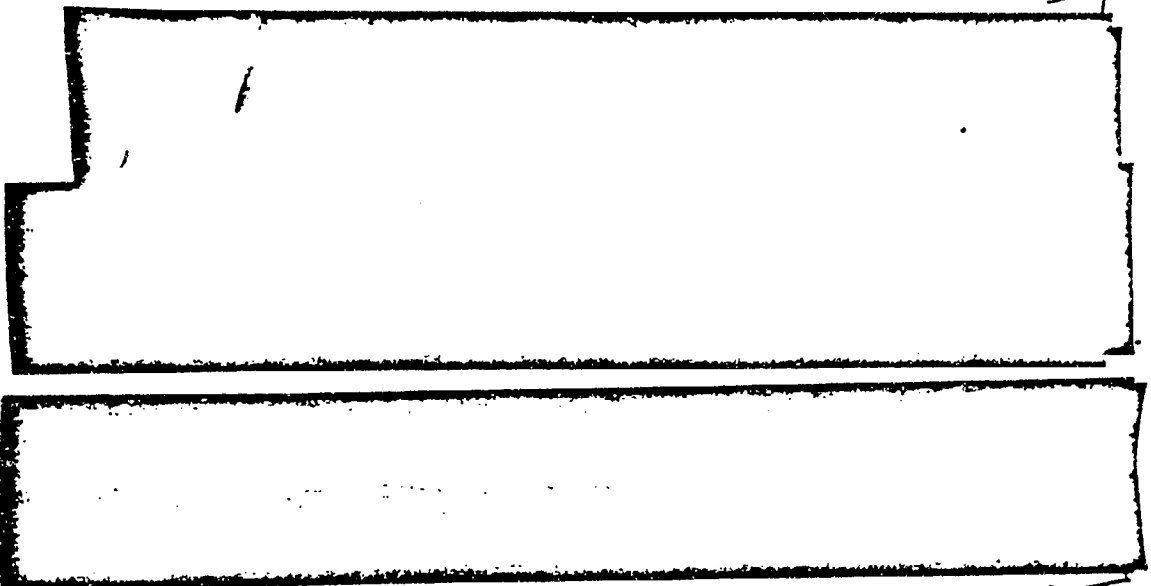
Paragraph 4b (old paragraph 6a) of NSCID 6 (2/17/72) requires NSA to produce communications intelligence "in accordance with objectives, requirements and priorities established by the Director of Central Intelligence with the advice of the United States Intelligence Board..."

NSA notes that since 1962, the Criminal Division of the Department of Justice has sent hundreds of names of racketeers to NSA requesting information NSA might have, or subsequently obtain, concerning them.

(Tab Z)

On July 5, 1973, the Assistant Secretary of Defense (Intelligence) requested an opinion from DOD General Counsel as to whether, inter alia, NSA was clearly operating within the law.

Assistant General Counsel Frank A. Bartimo responded by memorandum of July 10, 1973 (Tab AA1), in which he stated, in pertinent part:



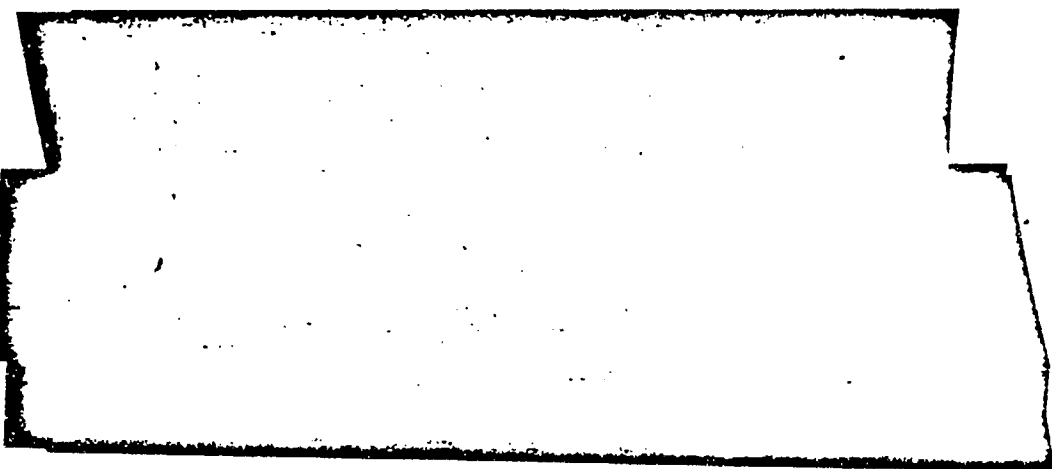
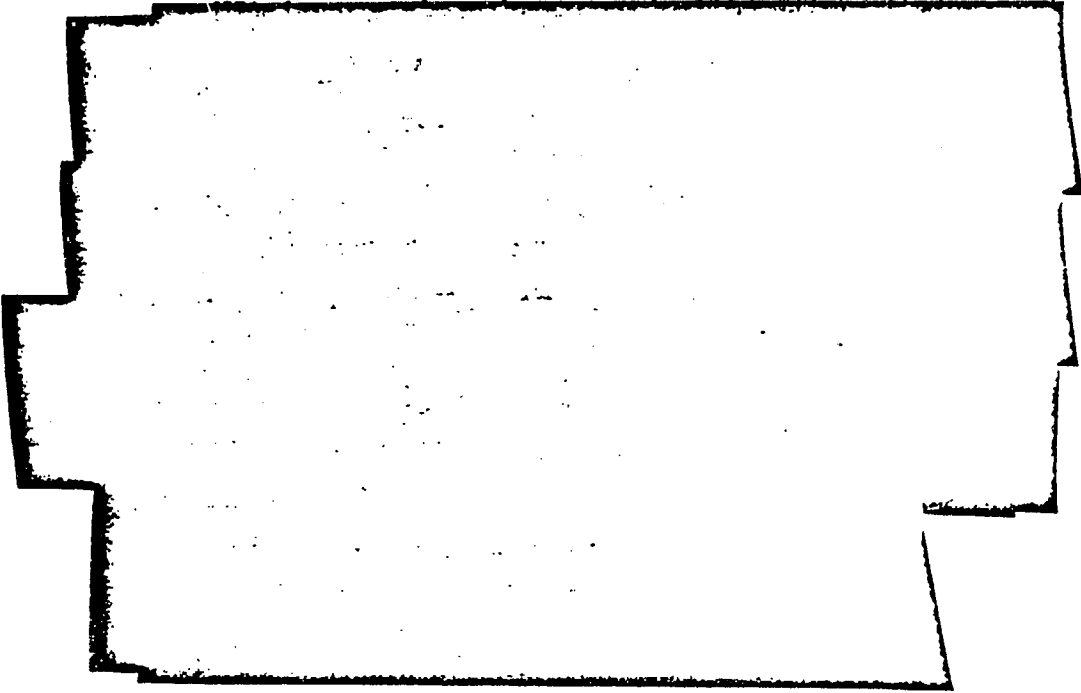
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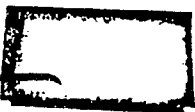
HANDLE VIA COMINT CHANNELS

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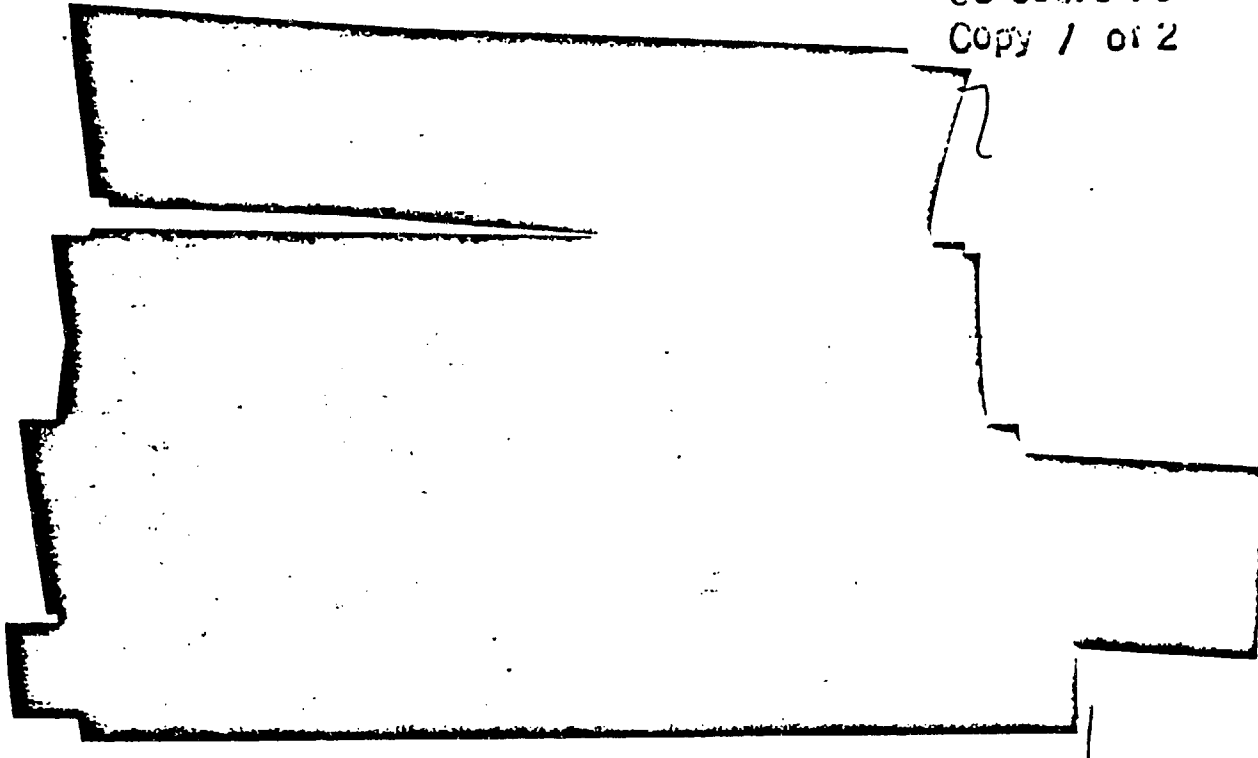


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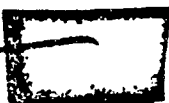
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On September 17, 1973, General Lew Allen, Jr., Director, NSA, wrote to DCI William Colby, et al., concerning "Watch List" procedures, stating that "as in the past, we at NSA will lack the wherewithal for verifying the appropriateness of the Watch List entries, and we will continue to rely upon you, as the requesting agency, for that assurance." (Tab AA2)

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G. UNITED STATES INTELLIGENCE BOARD

Pursuant to the provisions of the National Security Act of 1947, the National Security Council (NSC) issued NSCID 9 on July 1, 1948 establishing, inter alia, the United States Communications Intelligence Board "to effect the authoritative coordination of Communications Intelligence activities of the Government and to advise the Director of Central Intelligence in those matters in the field of Communications Intelligence for which he is responsible," i.e., coordination of the foreign intelligence activities of the United States.

NSCID 9, revised December 29, 1952, reconstituted USCIB to operate under the newly-created Special Committee of the National Security Council for COMINT consisting of the Secretaries of State and Defense and the Attorney General (when F.B.I. matters were before the committee), assisted by the Director of Central Intelligence.

The United States Intelligence Board (USIB) was established by NSCID 1 in 1958 to "maintain the relationship necessary for a fully coordinated intelligence community and to provide for a more effective integration of and guidance to the national intelligence effort..."

(The "intelligence community" includes the CIA, the intelligence components of State, Defense, Army, Navy, and Air Force, the F.B.I., AEC and NSC. Other components of the departments and agencies of the Government are included to the extent of their agreed participation in regularly established interdepartmental intelligence activities.)

The membership of the USIB since 1964 has been the Director and Deputy Director of Central Intelligence; the Director of Intelligence and Research, State Department; Director, DIA; Director, NSA; an AEC representative, and a representative of the Director, F.B.I. (Revised NSCID 1 effective 2/17/72 added a representative of the Secretary of Treasury). In addition, the Director of Central Intelligence, as Chairman, shall invite the chief of any other department or agency having functions related to the national security to sit with the USIB whenever matters within the purview of his department are to be discussed.

1. NSCID 1, March 4, 1964

NSCID 1 (revised March 4, 1964 and effective until February 17, 1972) directed that the USIB advise and assist the Director of Central Intelligence and:

- (1) Establish policies and develop programs for the guidance of all departments and agencies concerned.
- (2) Establish appropriate intelligence objectives, requirements and priorities.
- (3) Review and report to the National Security Council on the national foreign-intelligence effort as a whole.
- (4) Make recommendations on foreign-intelligence matters to appropriate United States officials, including particularly recommendations to the Secretary of Defense on intelligence matters within the jurisdiction of the Director of the National Security Agency.
- (5) Develop and review security standards and practices as they relate to the protection of intelligence and of intelligence sources and methods from unauthorized disclosure.
- (6) Formulate, as appropriate, policies with respect to arrangements with foreign governments on intelligence matters.

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The 1964 NSCID 1 provides that the USIB shall establish subordinate committees and working groups as appropriate and that the Executive Secretary and staff shall be under the direction of the DCI. (Paragraph 2c). This NSCID 1 further directs that the USIB reach its decisions by agreement, and that its decisions and recommendations be transmitted by the Director of Central Intelligence, as Chairman, to the departments and agencies concerned, or to the National Security Council when higher approval is required. (Paragraph 2d) Decisions of the Board arrived at under appropriate authority and procedures "shall be binding, as applicable, on all departments and agencies of the Government." (Paragraph 2g) (Emphasis added.)

2. NSCID 1, February 17, 1972

NSCID 1, effective February 17, 1972, provides that the USIB shall advise and assist the Director of Central Intelligence with respect to:

- (1) The establishment of appropriate intelligence objectives, requirements and priorities.
- (2) The production of national intelligence.
- (3) The supervision of the dissemination and security of intelligence material.
- (4) The protection of intelligence sources and methods.
- (5) As appropriate, policies and with respect to arrangements with foreign governments on intelligence matters.

Items 2 and 3, above, are new additions, while Items 1, 3 and 4 of the 1964 NSCID 1 were deleted. The revision appears to be primarily one

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of form, however. The basic duties of USIB remain substantially the same. 7

Both the 1964 NSCID 1 (Paragraph 3a) and its 1972 successor (Paragraph 3c) provide that the DCI shall act for the National Security Council by issuing such supplementary directives (DCIDs) as may be required and that such directives shall, as applicable, "be promulgated and implemented within the normal command channels of the departments and agencies concerned."

The 1964 NSCID 1 specifically directs that such DCIDs shall be issued "with the concurrence of the USIB", while the 1972 NSCID 1 authorizes the issuance of DCIDs "after appropriate consultation".

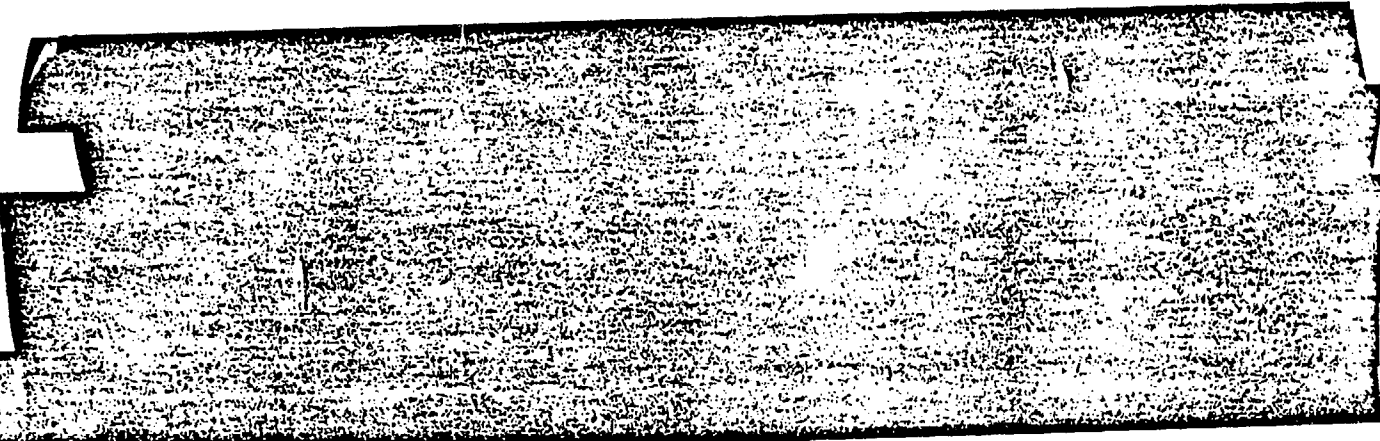
The provision in Paragraph 2g of the 1964 NSCID 1 that decisions of the USIB "shall be binding, as applicable, on all departments and agencies of the Government" was deleted in the 1972 NSCID 1, but the continuing provision, supra, that DCIDs be "implemented within the normal command channels of the departments and agencies concerned" seems to overlap the deleted phrase.

Paragraph 5c of the 1972 NSCID 1 effects a change in the authority to establish subordinate committees and working groups of the USIB. The primary authority previously vested in the Board was shifted to the DCI in 1972. The DCI's actions in this regard, of course, are still taken with the advice and assistance of the USIB. (See I(C), supra)

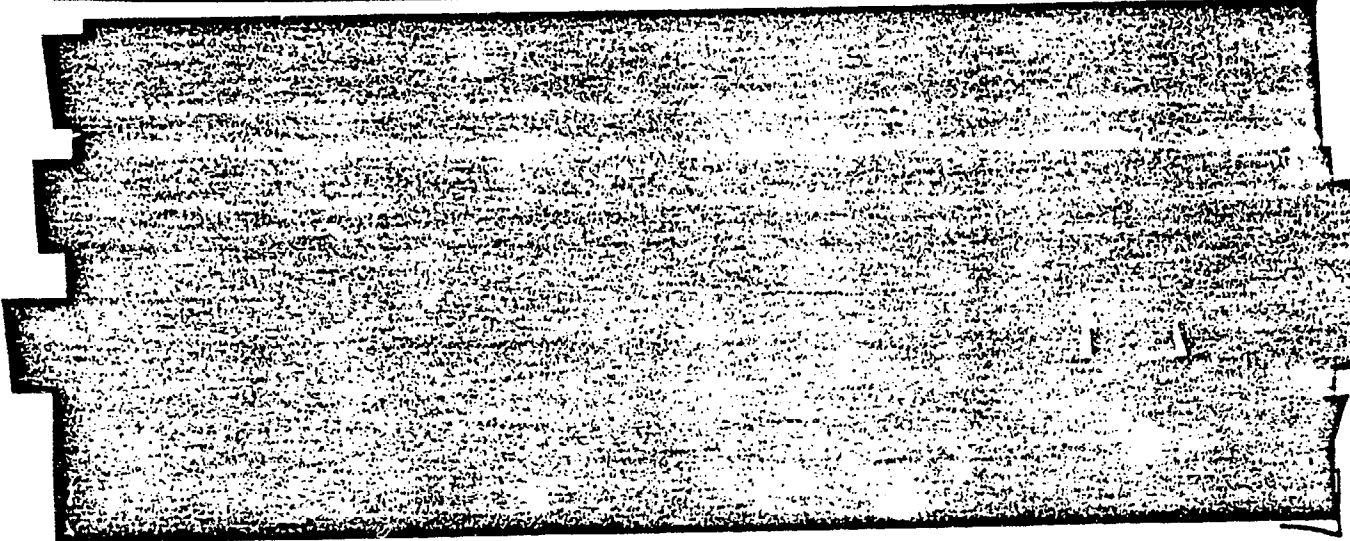
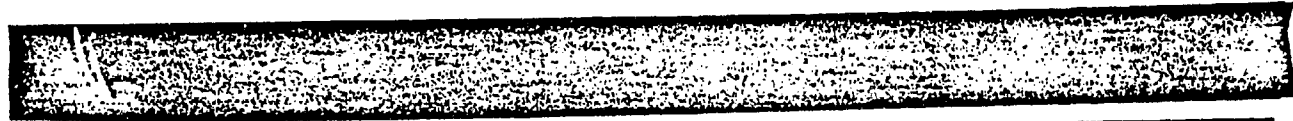
On April 10, 1970, the Director of ENDD, John E. Ingersoll, sent a list of requirements for communications intelligence to NSA. (Tab BB) The memorandum noted that "the consideration of the President's keen

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interest in eliminating the problem of drug abuse, it appears appropriate to include this requirement under Priority National Intelligence Objectives." The latter are set forth in DCID 1/3 of May 16, 1968.



The formulation of IGCP requirements was reportedly instituted in 1966 to provide NSA with specific priorities and guidelines in its overall responsibility for collecting signals intelligence for the United States.



[REDACTED]

Each requirement contained in the IGCP obligates NSA to perform three principal tasks with respect to the desired intelligence: to collect, to process, and to report, the requested information. Individual consumer agencies may approach NSA directly for information with respect to the reporting component of the requirement. By doing so, they do not necessarily request additional collection and/or processing efforts. [REDACTED] pointed out, however, that consumers and NSA are often in direct contact and USIB cannot maintain complete oversight. Consequently, NSA may, without the knowledge of USIB, embark upon a new collection requirement. [REDACTED] made this point because he did not want to unequivocally state that NSA strictly performs only those tasks specifically set out in the IGCP. [The prescribed procedure for handling direct requests from consumer agencies to NSA is set forth in a memorandum (Tab CC) for the members of the SIGINT Committee from

[REDACTED] SIGINT Committee Chairman, dated July 14, 1971:

When an Agency submits a requirement to NSA which falls within a line item and does not require in NSA's view additional resource allocations it should be honored by NSA. A supplemental requirement is not the vehicle for levying a new or changed requirement that is an add-on or deletion to the existing IGCP line items... NSA... should determine whether the supplemental requirement can be met from the managerial standpoint including feasibility and cost.... If the desired reporting is either (a) not within resources of (b) constitutes an add-on, deletion or significant change, in scope, periodically or timeliness, to an existing line item, NSA will so inform the consumer in question who may then formulate a new line item requirement for addition to the IGCP as guidance and forward it to the IGS. When

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approved by the IGS the SIGINT Committee will consider the item for incorporation as supplemental guidance to the IGCP. The SIGINT Committee will issue changes to the IGCP as appropriate unless further action by USIB is required.

On July 20, 1971, [REDACTED] member of the IGS sent a memorandum (Tab DD) to other IGS members which stated, in pertinent part:

1. Although it was recognized at the time the IGCP was drafted [1970?] that there was under development a processing effort against ILC traffic related to international narcotics activities, NSA advised the IGS that such effort should not be given visibility.
2. During the past year this effort was increased in scope, with most of the work done on the basis of informal requests for information from the various agencies involved in the problem. COMINT produced has been of great value to the CIA production offices and has been used as a principal source of information in several intelligence reports and memoranda. We understand that it has also been of considerable value to operational components, such as the Bureau of Narcotics and Dangerous Drugs.
3. CIA believes that because of the importance of this topic to national intelligence, it should be covered by a specific general line item in the IGCP for Subelement 32 and we propose the following statement:

"Report information relating to the international trafficking in narcotics and dangerous drugs.

Timeliness to be "within 72 hours after recognition" and reporting to be at an estimated completeness level of "2," which we understand from NSA to be the level of the current effort.

On August 11, 1971, the IGS approved, inter alia, the following change to the IGCP (Tab EE):

1. Add line item on international narcotics traffic activity (line item 8).

On August 20, 1971, the new narcotics requirement was added to Group B, Subelement 32 of IGCP (Tab FF) which applied to ILC (international commercial communications) networks, as opposed to foreign internal communications. The specific requirement was to report the following "within 72 hours after recogni-

- "8. International Narcotics activities.
a. Report information relating to the international trafficking in narcotics and dangerous drugs."

The July 22, 1974 revision of IGCP Subelement 32 contains identical language. (Tab GG).

On January 10, 1973, [REDACTED] member of IGS, sent another memorandum (Tab HH) to IGS members recommending the following:

1. In July 1971 CIA recommended, and in August 1971 USIB approved, a change in the IGCP reporting specification to include a requirement for information on international trafficking in narcotics and dangerous drugs from international commercial communications (Subelement 32). NSA has further developed its processing effort against other communications carrying information on this topic to where we should now include a regular reporting requirement for such information contained in various national internal and external communications.
2. The attachment lists by Subelement, those countries and Line Items which pertain to this requirement. No change in the level of reporting or timeliness is made. This supplemental requirement merely points up that narcotics trafficking information is specifically required to be reported when recognized in the target communications.

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3. This requirement has been coordinated with the: Chairman, Intelligence Subcommittee, Working Group of the Cabinet Committee on International Narcotics Control.

Upon this recommendation, a change in the reporting specifications for Subelements 24, 26, 27, 28, and 29 (respectively: Other Asian Countries, i.e., India; Latin America; Western Europe; Middle East and North Africa; and Sub Saharan countries) pertaining to international trafficking in narcotics and dangerous drugs was adopted and included in the IGCP in 1974. (Tab II). Generally, the language of this additional line item is identical in each Subelement and in all cases refers to travel. For example, Item 6, Group B, Subelement 27, of the 1974 IGCP provides:

- d. Travel of selected individuals. a/
(1) Travel of individuals related to narcotics trafficking. b/

a/ As specified by or through CIA

b/ As specified by BNDD, ONNI, Customs, and/or CIA

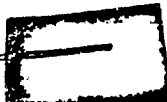
The above specification would seem to imply that NSA would be provided with targeted individuals [Watch Lists] by the consumer agencies.

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4. U.S. Intelligence Objectives

DCID No. 1/2, effective January 21, 1972, listed the U.S. intelligence objectives and priorities which were to serve as guidance for planning and programming for the subsequent period of five years. These objectives identified intelligence targets in terms of information needed "to enable the U.S. intelligence community to provide effective support for the decision making, planning and operational activities of the United States Government relating to national security and foreign policy." (Emphasis added.) The listed objectives included the following:

71. Non-governmental activities detrimental to U.S. interests. Activities of individuals and non-governmental organizations in the subject country which have an adverse impact on the interests of the United States and the welfare of its citizens, including the production and distribution of dangerous drugs and narcotics, training of terrorists and high-jacking.

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Latin America was designated as one of the areas concerning which such intelligence should be gathered.

On January 31, 1972, the DCI requested the Critical Collection Problems Committee (CCPC) of the USIB to conduct a review of intelligence efforts against narcotics, looking into such problems as the coordination of collection, dissemination and production of national intelligence information on narcotics.

In October, 1972, the CCPC reported as follows:

└ SIGINT INFORMATION ON NARCOTICS AND DANGEROUS DRUGS

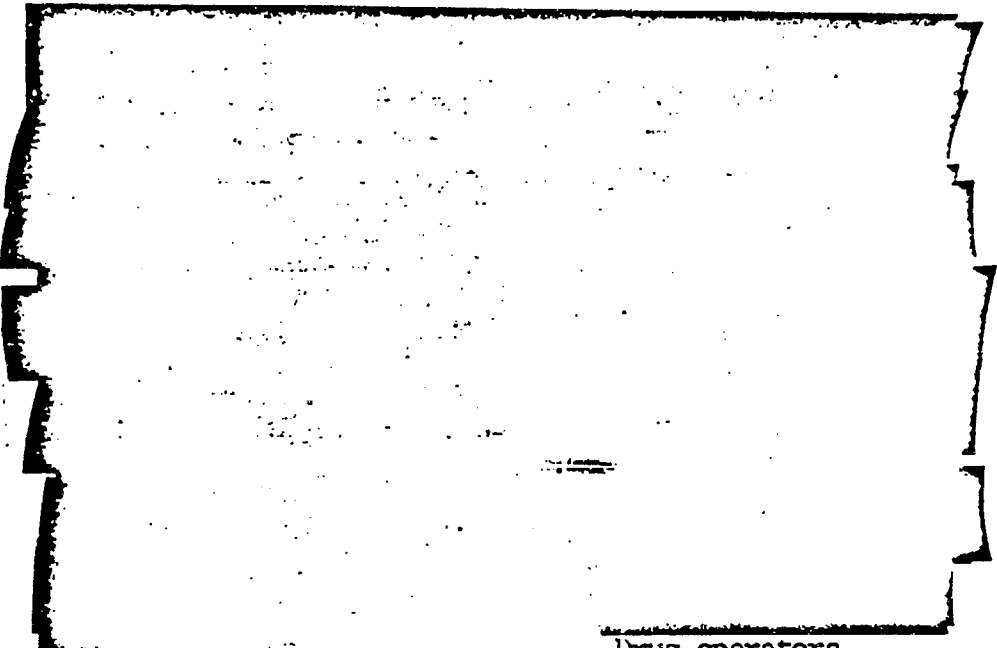
1. No SIGINT resources are dedicated solely to the intercept of narcotics information. The SIGINT which is now being produced on the international narcotics problem is a by-product of SIGINT reporting on other national requirements. However, in order to provide maximum support to U.S. Departments and Agencies in the field of international illicit narcotics activities, the SIGINT collection and reporting system worldwide has been tasked to report any narcotics information which is collected.
2. Most SIGINT reports on narcotics and dangerous drugs are disseminated electrically to customer agencies. ┘

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In the absence of a COMINT-secure teletype circuit to the ENDD, special arrangements for regular courier service have been made.



Drug operators communicate covertly, concealing who and where they are, and send only isolated or sporadic messages. Consequently, they tend to use either telephone or prearranged numbers or over-the-counter paid telegrams. This makes intercept and exploitation of such communications exceedingly difficult, but significant results might well be achieved.

5. The effective use of SIGINT information in support of on-going operations while at the same time protecting the source has been a problem. SIGINT frequently produces information which is valuable in an operational sense, but if used indiscreetly will result in a serious compromise. Any compromise can result in improved foreign communications security measures. The effect may be a permanent or temporary denial to the U.S. of intelligence information over and above the immediate drug problem. It is necessary to emphasize that in handling SIGINT, long-range interests must not be sacrificed for short-term gains.

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6. Successful usage of the SIGINT product is largely contingent upon close collaboration between the SIGINT producers and the appropriate customer agencies. Frequent exchanges between NSA, BNDD and CIA will ensure that SIGINT is exploited to its full capacity.

Recommendation

It is recommended that NSA, in conjunction with interested customers, particularly BNDD and Customs, make appropriate determination of what COMINT support is required on the narcotics problem and that the requisite priorities be established through the SIGINT Committee. (Tab LL)

Paragraphs (1) and (4), above, indicate an apparent lack of knowledge concerning the NSA's interception of international voice communications for narcotics intelligence which began in 1970. There seems to be an awareness of everything else, however, including the courier service between NSA and BNDD by which the latter received the product of the voice interceptions.

Based upon its study, the CCPC submitted recommendations to the USIB on November 3, 1972 which were approved by USIB on January 11, 1972 and incorporated in the IGCP on February 23, 1973 to include a broader requirement for "information related to narcotics trafficking" in Latin America and other specified countries.

In the DCI's August, 1973 "Perspective of the Intelligence Community," it is pointed out that as long as there exists a narcotics problem, intelligence agencies will be involved. In the KIQ's (Key Intelligence Questions) for FY 1974 and FY 1975, there are two questions regarding the narcotics problem. The first is to identify traffickers and producers and their methods; the second relates to the effectiveness of anti-narcotics

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programs in Mexico, France, Turkey, Thailand, Burma, and Laos. The second question included information concerning the willingness of those governments to "cooperate with the United States' efforts to expose and prosecute producers, traffickers, and their collaborators."

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H. PRESIDENT'S FOREIGN INTELLIGENCE ADVISORY BOARD (PFIAB)

By Executive Order 10655 (February 6, 1956), President Dwight D. Eisenhower established the President's Board of Consultants on Foreign Intelligence Activities (PBCFIA) "in order to enhance the security of the United States and the conduct of its foreign affairs by furthering the availability of intelligence of the highest order...." EO 10656 empowered the Board to review the foreign intelligence activities of the Government and the performance of functions of the Central Intelligence Agency and report its findings directly to the President. Its authority also extended to a review of foreign intelligence functions of other executive departments and any other related foreign intelligence matters which the President's Board deems appropriate.

By Executive Order 10938 (May 4, 1961), Executive Order 10656 was cancelled by President John F. Kennedy and the PFCFIA was reconstituted as the President's Foreign Intelligence Advisory Board (PFIAB). Its functions remained essentially the same as its predecessor Board; i.e., continuing review and assessment of all functions of the CIA and other departments having similar responsibilities in foreign intelligence and related fields in order to advise the President on matters bearing on foreign policy, national defense and security.

By Executive Order 11460 (March 20, 1969) President Richard Nixon cancelled Executive Order 10938 and reconstituted the PFIAB. While predecessor Boards served a purely advisory function, President Nixon expanded the role of the PFIAB to "receive, consider and take appropriate action with respect to

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matters identified to the Board . . . in which the support of the Board will further the effectiveness of the national intelligence effort." (Emphasis added.) The Nixon order also expanded the jurisdictional mandate of the Board beyond that of foreign intelligence-related matters by providing that the Board would "advise the President concerning the objectives, conduct, management and coordination of the various activities making up the overall national intelligence effort."

Since its inception in 1956, the Board has conducted its affairs independently of the National Security Council and has had continuing direct access through both its Chairman and the full Board to the President and his National Security Advisor. While independent of the NSC and its "40 Committee" on covert operations, the Board has had continuing access to all material maintained by the NSC and its committees, except during the Nixon Administration when the Board was denied access to such materials.

PFIAB minutes and records reflect the following:

May 26, 1961

* * *

5. The President should not be publicly identified nor otherwise publicly involved with non-overt political, psychological, propaganda, paramilitary, or clandestine intelligence activities.
6. The Central Intelligence Agency should strive to achieve anonymity in its officials and activities

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February 5, 1971

The Chairman opened the meeting by asking Attorney General Mitchell for his views on the adequacy of the overall U.S. intelligence effort.

Mr. Mitchell stated . . . that his office relies on information which it gets from NSA and CIA which may be collateral to the primary collection goals of these agencies but which is recognized as being useful to the DOJ and is forwarded to them.

[REDACTED]

He said that electronic surveillance is restricted to violence-prone groups, and that in these cases electronic surveillance is clearly within the jurisdiction of the Presidential responsibilities for maintaining law and order. (Emphasis added.)

* * *

[REDACTED]

Mr. Mitchell said that NSA and FBI Director Hoover are having a running battle on this very point.
✓ NSA is also urging resumption of physical entry...
Mr. Mitchell said we have more taps on now than when the Republicans came to Washington...

March 31, 1971 Memo for Board

[REDACTED]

(4) operations, generally known as SHAMROCK, whereby U.S. commercial communications firms make available to the U.S. Government copies of international

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commercial communications transmitted by foreign missions, or permit the U.S. communications by photography, etc....

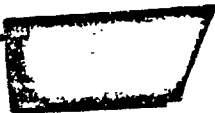
The vast majority of SHAMROCK collection is performed by NSA itself, i.e., through its own agreements with U.S. commercial communications firms and utilizing its own personnel. NSA obtains, on a daily basis, large quantities of commercial telegraphic traffic originated by foreign governments and foreign private enterprise within the United States...

February 3-4, 1972

Discussion with Mr. Nelson Gross, Special Assistant for Narcotics to the Secretary of State, and with Mr. Walter Mirmick, Staff Coordinator for the Cabinet Committee on International Narcotics Control.

Mr. Gross opened the discussion by saying that the Cabinet Committee had been established to provide a focal point at a high level for the Administrations program to combat the illegal importation, distribution, and use of narcotics. He said... that the only hope of success in combating this evil is to have a coordinated program which simultaneously seeks to stem the supply from abroad, prosecute the traffickers both at home and abroad, and to reduce demand through the provision of effective medical advice.

The Department of State's role is to work with foreign governments to reduce the production of heroin... and to stimulate and coordinate international cooperation in breaking up trafficking networks. Mr. Gross said... that the success of these programs would be wholly dependent on intelligence. Mr. Gross was critical of CIA efforts to date.... Mr. Gross said that CIA has

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been given responsibility for coordinating all narcotics intelligence abroad, but has assigned insufficient manpower to do the job... Mr. Gross said that the FBI had not been asked to work on this program because the ENDD... has exclusive jurisdiction for narcotics....

Mr. Mirmick said that the purpose in establishing the narcotics program at the Cabinet level was to add White House clout in getting the cooperation of all the necessary Government agencies and bureaus. Mr. Gross said that nearly the program had all the authority it needs... (Emphasis added.)

Discussion with ~~_____~~
Chairman of the Intelligence Subcommittee
of the Cabinet Committee on International
Narcotics Control.

~~_____~~ is Mr. Helms' Special Assistant for narcotics matters and Chairman of the Cabinet Committee Subcommittees for Intelligence....

~~_____~~ said that the Agency's role in the narcotics program began in October 1969 with a White House request for CIA to do whatever it could to help with this problem. Such a directive, he said, raised two problems for the Agency: the first was to establish a mechanism and working relationship with law enforcement authorities and the second was adjusting agency priorities. He said that the Agency mission was to support the narcotics program by establishing where illicit narcotics were coming from and, secondly, to provide intelligence for the diplomatic effort to reduce production and trafficking. ~~_____~~ said that the Agency has moved slowly for good reason....

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[REDACTED] said... the primary groups involved are criminal syndicates.

... [REDACTED] stated he was satisfied that the Agency had a sense of urgency....

[REDACTED]... said that NSA provides regular coverage of persons on a watch list and is prepared to do more as soon as the Intelligence Subcommittee can develop the necessary target data.

Discussion with DCI Helms

Mr. Helms had been asked to discuss the allocation of intelligence resources for the narcotics problem.... He agreed to follow up Dr. Baker's suggestion to see if CIA couldn't give some direct assistance to the ENDD in organizing their files and staff for participation in what is now a major Government program.

Discussion with Mr. John Ehrlichman,
Assistant to the President for Diplo-
matic Affairs.

Mr. Ehrlichman had been asked to discuss... the role of foreign intelligence in combating our domestic narcotics problem...

In conclusion, the Chairman offered Mr. Ehrlichman any assistance which the Board could render with respect to the narcotics problem...

February 3, 1972 (CIA) Memorandum on
Intelligence Support for International
Narcotics Control.

- I. Two years ago the development of foreign

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on narcotics... was a wholly new enterprise
for the intelligence community....

* * *

- B. We began to organize a narcotics intelligence effort in October 1969, when President Nixon declared international narcotics control to be a major goal of U.S. foreign policy and established a White House Task Force on heroin suppression, instructing all Federal departments and agencies, including the intelligence community, to cooperate fully with its efforts....

* * *

- IX. Organized criminal conspiracies tend everywhere to monopolize the illicit trade...

* * *

- a. South American smuggling operations are now carrying a substantial part of the French heroin to the U.S. via Latin America.

* * *

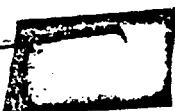
- XIV. As a result of the presidential initiative from mid-1971, intelligence support for international narcotics control has become virtually world-wide.

- A. In October 1971 the Working Group of the CCINC directed that U.S. missions in close to 60 countries draw up narcotics control action plans.

* * *

- XVI. B. With the establishment of the CCINC... leadership responsibilities for coordination of foreign intelligence on narcotics passed from ENDD to CIA.

* * *

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HANDLE VIA COMINT CHANNELS

- XVII. 2. The targets bring us, both in operations and production, into a closer relationship with U.S. law enforcement. Our job is to feed them intelligence and leads which they can use in their efforts to investigate and eventually prosecute or expose middle and top level narcotics traffickers in the U.S. and abroad.
- XVIII. 1. The thrust of current national strategy commits the community to directly support domestic enforcement...

* * *

3. We must help them and still protect intelligence officers and sources abroad from investigative or legal disclosures. Otherwise the intelligence community will find itself where it cannot afford to go - in court as a witness.

April 12, 1972 memorandum to [REDACTED]
from Egil Krogh, Executive Director,
CCINC.

The President is intensely interested in
using every means at his disposal to stop
the international narcotics traffic. This
includes covert action where appropriate....
(Emphasis added.)

~~TOP SECRET~~ [REDACTED]

I. Intelligence Evaluation Committee (and Staff)

1. Background: Formed December 1970 to produce fully-evaluated national domestic intelligence studies, including studies on demonstrations, subversion, extremism and terrorism. Membership: Department of Justice (Chairman); Federal Bureau of Investigation; Department of Defense; Secret Service; National Security Agency; Central Intelligence Agency; and as necessary representatives of other Departments or Agencies (following have participated: Treasury and State). Staff: IES Executive Director John Dougherty and later Bernard Wells supplied by Department of Justice with title of Special Assistant to the Attorney General reporting to the Assistant Attorney General for Internal Security Robert Mardian and later William Olson. IES has received requirements directly from and delivered reports directly to John Dean of the White House has insisted that the existence of this Committee be kept secret. (Emphasis added.)

2. CIA Participation: Contributions on foreign aspects (by memorandum with no Agency letterhead or attribution). Contributions occasionally include foreign intelligence provided by FBI and NSA. The Chief of the Special Operations Group serves as the Agency representative on the Intelligence Evaluation Committee Staff and as the alternate to the Agency representative on the Committee (who is the Chief, Counter Intelligence Staff).

The White House was represented by Gordon Liddy at an Intelligence Evaluation Staff meeting on August 4, 1971. The following are excerpts from a summary of Liddy's remarks:

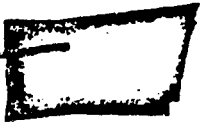
a. White House action: The President is deeply concerned at leaks including the Ellsberg case, SALT talks, the U-2, and the recent Jack Anderson column; and the President wants this sort of thing stopped.

Mr. Ehrlichman has been given the responsibility for handling this matter within the White House and is to be assisted by Bud Krogh, David Young (who has been borrowed from Dr. Kissinger), Gordon Liddy and others.

b. Liddy's role: He is an expediter to break down bureaucratic problems by applying either grease or dynamite. He will sit with the IES and audit the IEC meetings. Mr. David Young can speak for Mr. Ehrlichman and is "heavier" than Mr. Liddy; therefore, any requests from Mr. Young should be honored without checking with Liddy.

c. IES role: 1) to prepare evaluation. Mr. Liddy noted that the IES had not yet been formally tasked in this regard. 2) provide ideas for attacking and solving the problem. 3) channel to agencies. Mr. Liddy intends to use the Staff members for direct and rapid access to their own Agencies in order to get over and minimize bureaucratic problems. He specifically stated that although agencies would be tasked through their agency heads, Mr. Ehrlichman was not prepared to wait until agencies had polished their contributions and sent them back through channels, but rather wanted to have access to information when and as it is developed. Mr. Liddy, therefore, would expect to be able to ask for things through the IES members and have them vested with the authority to get them and release them to the White House.

Beyond the foregoing, the IES seems to have been preoccupied in 1971 and 1972 with foreign support for activities planned to disrupt or harrass the national political conventions in 1972.

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IV. POSSIBLE VIOLATIONS

This inquiry has focused on the interception of wire and radio communications having at least one terminal in the United States or a United States territory. Federal criminal sanctions have no application to the extraterritorial interception of communications, i.e., communications with all terminals outside the United States. United States v. Catrone, ____ F.2d ____ (2 Cir. 1975); United States v. Toscanino, 500 F.2d 267,269 (2 Cir. 1974) Berlin Democratic Club v. Rumsfeld, Civil No. 310-74 (D.D.C. March 17, 1976). (Evidence obtained from such interceptions which do not meet Fourth Amendment standards, however, is subject to exclusion in U.S. courts.)

Three categories of interceptions discussed herein require prosecutive evaluation:

- (1) The interception of international communications having one terminal in the United States (or a United States territory).
 - (2) The procurement from commercial carriers of "cable traffic" between the U.S. and foreign countries.
-

An initial review of available facts will indicate possible violations of 18 U.S.C. 2511 and/or 47 U.S.C. 605, but a tentative analysis of the applicable statutes, legislative history, and convoluted sources of purported authorization together with anticipated difficulties in proving willfulness, preclude any unequivocal recommendation for prosecution at this juncture.

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A. Interception of International Communications
Having One Terminal In The United States or
a United States Territory.

These interceptions were conducted by NSA in the gathering of foreign intelligence information [REDACTED] which, broadly defined, included the MINARET (Tab N) [REDACTED]
[REDACTED]

The CIA's [REDACTED] was devoted exclusively to the gathering of international narcotics intelligence through the interception of specific commercial voice frequencies between South America and the United States. The NSA's MINARET and [REDACTED] Projects included, but were not limited to, the selection and/or collection of narcotics intelligence, and involved the incidental, as well as specific, interception of voice and non-voice communications concerning a variety of subjects.

1. Pertinent Criminal Statutes

Title 18

Section 2511(a)(c)(d), Title 18, United States Code, infra.

Title 47

Section 605 of Title 47, United States Code, provides in pertinent part:

... No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person...

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... no person having received any intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of such communication was intercepted, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of such communication... or use such communication... for his own benefit or for the benefit of another not entitled thereto...

B. Receipt of "Cable Traffic" From
International Communications
Carriers.

This activity was conducted by NSA under the cryptonym SHAMROCK (Tab P), and by the FBI as the "Drop Copy Operation". (Tab R)

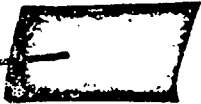
LPMEDLEY was a CIA operation limited solely to providing NSA with a "front" location in New York City for processing SHAMROCK material. (Tab G)

1. Pertinent Criminal Statute

Title 47

Section 605 of Title 47, United States Code, provides in pertinent part:

... [N]o person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addresses... (5) in response to a subpoena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority...

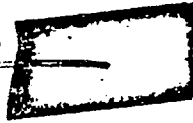
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... No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication... for his own benefit or for the benefit of another not entitled thereto.

1. Pertinent Criminal Statutes

Such interception without appropriate authority, if willful, would be in violation of 18 U.S.C. §2511(a)(c)(d), or 47 U.S.C. §605, infra.

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V. Applicable Statutes and Law

Prosecutive considerations in the instant inquiry are limited to possible violations of 18 U.S.C. 2511 or 47 U.S.C. 605.

A. 47 U.S.C. 605

Section 605, originally enacted in 1934, was amended on June 19, 1968 upon the enactment of 18 U.S.C. §2510, et seq. The new Section 605 was intended as a substitute rather than the mere reenactment of the old Section 605. It is designed to regulate the conduct of communications personnel, and to prevent the unauthorized interception and disclosure, or use, by any person of radio communications. 1968 U.S. Code Cong. and Adm. News 2196-2197.

"Radio communications" or "communications by radio" means the transmissions by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission. 47 U.S.C. §153(b).

Section 605 consists of four separate clauses containing four distinct pairs of prohibitions:

- (1) The first clause prohibits divulgence by any person receiving any interstate or foreign communication by wire or radio, except through authorized channels of transmission or reception.
- (2) The second clause proscribes the unauthorized interception and divulgence of any radio communication.
- (3) The third prohibits the receipt of an interstate or foreign radio communication by a person not entitled thereto and the use thereof for his benefit or for the benefit of another not entitled thereto.

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- (4) The fourth proscribes the receipt of any intercepted radio communication and divulgence thereof or use for one's benefit or the benefit of another not entitled thereto.

"Person" as used in Section 604 does not include a law enforcement officer acting in the normal course of his duties. 1968 U.S. Code Cong. and Adm. News 2197.

"Foreign communication" within the meaning of 47 U.S.C. 605 is a communication from or to any place in the United States to or from a foreign country. 47 U.S.C. §153(f).

Section 501 of Title 47, United States Code, contains the general misdemeanor penalty provisions for violations of §605 and requires that such offenses be willfully and knowingly committed.

B. 18 U.S.C. 2510, et seq.

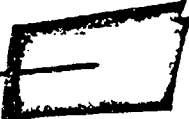
The regulation of the interception of wire or oral communications is governed by 18 U.S.C. §§2510, et seq. 1968 U.S. Code Cong. and Adm. News 2196.

Section 2511 of Title 18, United States Code, provides in pertinent part:

(1) ... [A]ny person who

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept, any wire or oral communication....

* * *

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(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication...

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication....

shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

"[W]ire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications. 18 U.S.C. 2510(1).

"[O]ral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation. 18 U.S.C. §2510(2).

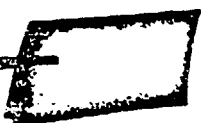
"Intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device. 18 U.S.C. §2510(4).

C. Willfulness

Willfulness is essential to the commission of each of the above offenses.

1. United States v. Murdock

The legislative history of 18 U.S.C. §2511 indicates the applicable standard of willfulness in the instant context is that set forth in United

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States v. Murdock, 290 U.S. 389 (1933), a criminal tax case. 1968 U.S. Code Cong. and Adm. News 2181.

In Murdock, the Court recited, with apparent approval, the following judicial connotations of the word "willfully":

The word often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose... without justifiable excuse... stubbornly, obstinately, perversely.... The word is also employed to characterize a thing done without ground for believing it is lawful... or conduct marked by careless disregard whether or not one has the right so to act.... (290 U.S. at 394-395)

The standard of willfulness in Murdock is formulated as follows:

...[B]ad faith or evil intent... or evil motive and want of justification... It is not the purpose of the law to penalize... innocent errors made despite the exercise of reasonable care.... The requirement of an offense committed "willfully" is not met... if a taxpayer has relied in good faith on a prior decision of this court... The Court's consistent interpretation of the word "willfully" to require the element of mens rea implements the persuasive intent of Congress to construct penalties that separate the purposeful... violator from the well-meaning, but easily confused...." (United States v. Bishop, 412 U.S. 346, 360-361 (1973))

Congress did not intend that a person, by reason of a bona fide misunderstanding, should become a criminal by his mere failure to measure up to the prescribed standard of conduct. United States v. Murdock, supra.

2. 18 U.S.C. §2520

Section 2520 of Title 18, United States Code, provides that a good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under Title 18 or Title 47. The legislative history of Section 2520 cites Pierson v. Ray, 286 U.S. 547 (1967), as the only supporting authority and guide to the "good faith" criteria contemplated by the statute. 1968 U.S. Code Cong. and Adm. News 2196.

The Pierson case involved an action for damages against policemen for deprivation of civil rights under 42 U.S.C. §1983 and common law false arrest. The respondent policemen had arrested petitioners for breaching the peace in violation of a state statute which was subsequently declared invalid. The Supreme Court reaffirmed that the defense of good faith and probable cause is available to police officers, and further held that "a police officer is not charged with predicting the future course of constitutional law." This indicates a legislative intent in 18 U.S.C. §2520 to excuse from civil and criminal liability those persons who act under a statute they reasonably believe to be valid.

The "legislative authorization" apparently relied upon by most of the potential defendants herein is 18 U.S.C. §2511(3), i.e., the statutory recognition of Presidential power to authorize warrantless electronic surveillances to protect the national security. This statute, upon its enactment in June, 1968, was vague with respect to the scope of such power,

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and it was not until June, 1972, that the Presidential power to authorize domestic security electronic surveillances was delineated by the U.S. Supreme Court. (See III, supra.) The President's power to authorize the warrantless electronic surveillance of activities of foreign powers or their agents has not yet been defined by the Supreme Court. It is likely, therefore, that potential defendants (particular subordinates) will seize upon the decision in Raley v. Ohio, 360 U.S. 423, 438 (1959), in which the Court held that "a State may not issue commands to its citizens, under criminal sanctions, in language so vague and undefined as to afford no fair warning of what conduct might transgress them".

While it is true that men are, in general, held responsible for violations of the law, the layman is not required to know more law than the judge. United States v. Mancuso, 139 F.2d 90, 92 (3 Cir. 1943).

3. Zweibon v. Mitchell

The Court in Zweibon v. Mitchell, 516 F.2d 594, 671-672, (D.C. Cir. 1975), cited Pierson v. Ray, supra, in reaffirming the defense of good faith:

Thus, in light of the fact that Congress made the applicability of Title III turn on the future course of constitutional law, as well as the fact that the legislative history and language of Title III are themselves somewhat ambiguous concerning the applicability of that chapter to national security surveillance, and considering the policy that statutes in derogation of the common law should be strictly construed, we do not believe Congress intended to preclude a good faith

defense that Executive officials acted under what they reasonably believed were the constitutionally inherent (and therefore statutorily exempt) powers of the President....

In a footnote, the Court added:

The rights of victims of unconstitutional actions must to some extent be balanced against the needs of law enforcement, particularly when an official in good faith acts according to a reasonable belief that his actions are lawful. (516 F.2d at 616n.278)

"Willfulness" in the instant context would seem to require bad faith rather than bad judgment. Good intentions coupled with bad judgment would not constitute such willfulness. Mullen v. United States, 263 F.2d 275, 276 (D.C. Cir. 1958).

D. 'Plain View' Analogy

Objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence. Harris v. United States, 390 U.S. 234, 236 (1967). This "plain view" doctrine serves to supplement the prior justification and permits the warrantless seizure. Coolidge v. New Hampshire, 403 U.S. 443, 466 (1970).

The plain view doctrine might be invoked, by analogy, to justify incidental communications intercepts, e.g., the incidental interception of communications concerning international narcotics traffic in the course of conducting Presidentially-authorized electronic surveillance for the purpose

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of gathering foreign intelligence information. This analogous application of the plain view doctrine in the context of electronic surveillance finds support in 18 U.S.C. §2517(5). United States v. Kahn, 415 U.S. 143 (1974). Section 2517(5) permits the disclosure and use of communications relating to offenses other than those specified in the order of authorization where such communications are intercepted while engaged in intercepting communications in the manner authorized by the order.

NSA represents that over 50 per cent of the narcotics intelligence furnished by NSA to BNDD/DEA came from communications incidentally intercepted or incidentally received in the course of collecting foreign intelligence information pursuant to NSA's Presidential mandate and authorization.

E. "Border Search" Analogy

[The Treasury Department supports receipt by the Secret Service of SIGINT intelligence from NSA on grounds that the interception of messages crossing our national borders is analogous to conducting warrantless border searches which are clearly legal (Tab MM):

If the search of the person is, thus, permissible, is it not reasonable that equal latitude be afforded to the impersonal harvesting of international communication signals for purposes clearly of great consequence to our national security? Upon that premise, the incidental acquisition from international signal communications of important intelligence not supported by a foreign nexus is clearly an acceptable and reasonable intrusion into that realm of privacy protected by the Fourth Amendment.

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The SIGINT activities of NSA constitute an essential attribute of the Executive's capability and obligation to protect and promote the national security and foreign relations of the United States. One must, in reason, attribute to NSA's SIGINT acquisition of foreign intelligence an importance which surpasses that attending the border search authority earlier characterized as "an indispensable exercise of the right of the sovereign to self-protection. . ."

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HANDLE VIA COMINT CHANNELS

VI. POSSIBLE DEFENSESA. Interception of International Communications Having One Terminal in the United States or a United States Territory.1. Interception of International Radio-Landline Telephone Communications(a) 18 U.S.C. §2511(i) Radio-Telephone Communications

The legislative history of Title III (18 U.S.C. §2510, et seq.; 47 U.S.C. §605) contains "no indication of how Congress intended to treat a radio-telephone conversation". United States v. Hall, 488 F.2d 193, 197 (9 Cir. 1973).

In the absence of such indication, particularly with respect to the interception of radio portions of such communications, the applicable statutes and legislative history must be examined to ascertain whether there is a clear, overall legislative purpose upon which one statute, to the exclusion of the other, may be validly applied to the instant facts.

The provisions of 18 U.S.C. §2511 and 47 U.S.C. §605 are not mutually exclusive. They overlap. Section 2511 prohibits the interception of "wire communications," as broadly defined in 18 U.S.C. §2510(1), while Section 605 regulates the interception and divulgence of "radio communications," as broadly defined in 47 U.S.C. §153. A tentative application of either statute is possible in the instant context.

Section 2511 prohibits, except as otherwise specifically provided:

.... the interception and disclosure of all wire or oral communications. Paragraph (1) sets out several prohibitions. Subparagraph (a) prohibits the interception itself. This eliminates the requirement under existing law that an "interception" and a "divulgence" must take place. [47 U.S.C. §605 previously required the interception and divulgence of both wire and radio communications].... Subparagraph (a) establishes a blanket prohibition against the interception of any wire communication. Since the facilities used to transmit wire communications form part of the interstate or foreign communications network, Congress has plenary power under the commerce clause to prohibit all interception of such communications, whether by wiretapping or otherwise. (Weiss v. United States, 308 U.S. 321 (1930). 1968 U.S. Code Cong. and Adm. News 2180. (Emphasis added.)

The above would seem, at first, to foreclose the applicability of 47 U.S.C. §605 to the instant situation. The citation of Weiss v. United States, however, indicates that the legislative history refers to the scope of communications covered by §2511 rather than to the inclusion of additional methods of interception.

Weiss was a wiretapping case under the provisions of the "old" (pre-Title III) 47 U.S.C. §605 in which the Supreme Court held that the prohibitions of the second clause of §605 applied to intrastate as well as interstate and foreign communications when transmitted over wires used for both kinds of communications. Weiss v. United States, 308 U.S. 321, 327-328 (1939). This would not seem necessarily to favor §2511 in the coverage of the interception of radio portions of radio-landline telephone communications.

(ii) Wire Communications

Paragraph (1) of 18 U.S.C. §2510 defines "wire communication" to include "all communications carried by a common carrier, in whole or in part, through our Nation's communications network. The coverage is intended to be comprehensive." 1968 U.S. Code Cong. and Adm. News 2178.

But does this encompass international communications as they pass over foreign countries? Or international bodies of water? Does it really mean, as it says, communications "carried through our Nation's communications network"? If so, is our "Nation's communications network" confined to the communications network within the Nation?

Whatever the answers to the foregoing, there is no question that §2511 covers the "aural" acquisition of all wire portions of radio-landline telephone communications, and may also be construed to cover the radio portions as well. There remains an obvious qualitative difference, however, between the radio and wire segments of radio-landline telephone communications (particularly international communications) — a distinction Congress pointedly recognized and reaffirmed in maintaining the concomitant viability of §605 requiring both the interception and divulgence of radio communications to constitute a mere misdemeanor.


(iii) The "Nation's Communications Network"

The "Nation's communications network", according to [REDACTED]
[REDACTED] NSA, is generally regarded by those in the industry as the commercial

communications system within the United States. This system may be characterized as contiguous, switched (e.g., from wire to cable to microwave), automatic, and self-routing. It's "wireless" component is a multi-channel microwave carriers system capable of carrying up to 2,000 communications on some channels.

International commercial radio-telephone communications, on the other hand, are transmitted by high-frequency, single or multi-channel telephony which enters the national communications network through what are known as "gateways". (The latter term seems to connote passage from one system to another.) This high-frequency telephony is not as reliable as microwave transmission and is considerably more susceptible to interception by unsophisticated equipment such as ship-to-shore radio or the ordinary Zenith transoceanic-type portable radio.

Microwave transmission is "straight line" and covers much higher frequencies than "high frequency telephony" which follows the curvature of the earth. It is estimated, for example, that the radio portion of a high frequency single-channel radio-telephone communication from Montevideo, Uruguay, to New York City, could be intercepted with unsophisticated radio receivers over an area of perhaps 30 per cent of the earth's surface. High frequency multi-channel transmissions may be de-channelled by "home-made" amateur equipment. An index of the users of international radio frequencies is reportedly published by the FCC and may be obtained from the Government Printing Office. The only guarantee of privacy in such high frequency radio transmissions is the use of special ciphony equipment to "garble" the communications. Such equipment, however, is not in general use by commercial carriers.

(iv) Justified Expectations of Privacy

The three general categories of communications covered by Title III - wire, oral and radio - are distinguished, implicitly and explicitly, according to the degree of justified expectations of privacy. While an almost total expectation of privacy seems to be justified in communications transmitted wholly by wire, the expectation of privacy of oral communications is justified only if uttered under circumstances justifying that expectation, e.g., communications in one's home or office. Communications in a jail cell or an open field, for example, would not normally justify such expectation. 1968 U.S. Code Cong. and Adm. News 2178.

(v) Felony vs. Misdemeanor

The willful interception, alone, of a wire or oral communication completes the felony offense under §2511. In the case of a radio communication, however, there must be both an interception and divulgence to constitute the misdemeanor under §605. If we ignore both the explicit legislative distinction between radio communications and other types of communications, and the implicit legislative scale of justified expectations of privacy, the severity of criminal penalties imposed by Congress would appear in some instances to be inversely proportionate to the extent of privacy violated. (See vi, infra.) Congress obviously placed radio communications below wire and oral communications on the ascending scale of justified expectations of privacy.

The court in United States v. Hall, 488 F.2d 193, 197 (9 Cir. 1973), observed that the radio portion of a radio-landline telephone communication, logically, should be afforded no more protection than those occurring between two radio transceivers. The court declined, however, to exercise its option to find that "surely Congress did not intend" such as absurd result.

The specific issue in Hall was whether the contents of defendants' radio-telephone conversations monitored by law enforcement officers should have been suppressed in the prosecution of defendants for marijuana violations. Some of the conversations were transmitted between two radio telephones, while others were between a radio-telephone and regular land-line telephone.

The Court quickly found 47 U.S.C. §605 inapplicable, stating:

The legislative history also explicitly shows that Congress intended to exclude law enforcement officers from the purview of the new §605.... It is obvious that the legislature wanted law enforcement personnel to be governed exclusively by Chapter 119 of Title 18. Therefore, because the critical communications were intercepted by lawmen, §605 offers no impediment.

The applying 18 U.S.C. §§2510, et seq., however, the Court reached an admittedly "absurd result":

... [W]e are forced to conclude that, when part of a communication is carried to or from a land-line telephone, the entire conversation is a wire communication and a search warrant is required.

We realize that our classification of a conversation between a mobile and a land-line telephone as a wire communication produces what appears to be an absurd result. These conversations were intercepted by an ordinary radio receiver and not by a phone tap. Logically they should be afforded no more protection than those occurring between two radio transceivers. They

should be oral communications. However, Congress's definition of a wire communication necessitates this conclusion.

This is especially ironic since Title III of the Crime Control Act contains stringent civil and criminal penalties for those who violate its provisions. In other words, any citizen who listens to a mobile telephone band does so at its [sic] own risk, and scores of mariners who listen to the ship-to-shore frequency, commonly used to call to a land-line telephone, commit criminal acts. (Emphasis added.)

The "absurd result" could have been avoided, of course, by applying 47 U.S.C. §605 to the radio portion of the radio-landline telephone communications.

Congress may have been silent as to its intent in radio-telephone situations, but it can hardly be presumed to have intended a patently "absurd result". It is a fundamental canon of statutory construction that a legislative enactment must be so interpreted as to carry out the legislative will and in a manner that would not reach an "absurd result". United States v. Lewis, 87 F.Supp. 970, 972, (D.D.C. 1955). The Fourth Amendment also "shuns absurd results". 489 F.2d at 198.

(It is one thing, of course, to interpret a statute in favor of the accused, but quite another to expand its meaning where to do so works against the accused. Pugach v. Klein, 193 F.Supp. 630, 640 (S.D.N.Y. 1961).)

The radio-telephone conversation in Hall which did not involve land-line telephones, i.e., radio-to-radio, were held not be "oral communications" within the meaning of 18 U.S.C. §2510(2) because, the

Court found, they lacked the requisite expectation of privacy. (The district judge had previously made a specific finding that defendants knew they could be heard by other people and, therefore, had no right to privacy.)

This seems, however, to be a case of reaching the right result for the wrong reason. The 'new' Section 605, enacted simultaneously with 18 U.S.C. §§2510, et seq., was expressly intended as a substitute rather than the mere reenactment of its predecessor. 1968 U.S. Code Cong. and Adm. News 2196. If it has any substance at all, §605 would seem to cover at least the interception of all communications transmitted entirely by radio. It does not apply to law enforcement officers, however, because "person", as used in the statute, does not include a law enforcement officer acting in the normal course of his duties. 1968 U.S. Code Cong. and Adm. News 2197. In a letter to the Chairman of the Federal Communications Commission on September 15, 1975 (Tab NN) concerning FCC monitoring of citizen band radio transmissions, the Justice Department's Office of Legal Counsel stated:

Giving the word "person" such an interpretation would allow law enforcement officers generally to intercept and divulge radio communications.

The application of §605 in Hall would have achieved the same result with respect to the interception of purely radio communications, but without the strained application of 18 U.S.C. §§2510, et seq.

(vi) Oral Communications

There appears to be no more reason for re-classifying certain radio communications as "oral communications" than there would be to include "wire communications" under "oral communications".

Section 2510, Title 18, United States Code, contains separate and distinct definitions of "wire" and "oral" communications. There is no indication of a legislative intent to pre-empt, under the caption of "oral communications", all wire communications transmitted with a reasonable expectation they will not be intercepted. Despite the expectation of privacy, the latter do not become "oral communications". They remain, simply and exclusively, wire communications under 18 U.S.C. §2510(1).

Similarly, there is no indication Congress intended to include under "oral communications" all radio communications transmitted with a reasonable expectation they will not be intercepted. These remain radio communications under the definition of 47 U.S.C. §153(b).

It seems to be stretching 18 U.S.C. §§2510, et seq., to construe purely radio communications (even those with a reasonable expectation of privacy) intercepted by law enforcement officers as "oral communications". Nowhere in the legislative history or language of 18 U.S.C. §§2510, et seq., is there any indication that Congress intended to single out, for felony prosecution, only law enforcement officers who intercept radio communications, while providing an option to prosecute, for misdemeanors, all others who not only intercept, but divulge, such communications.

The statute specifically defines "oral communication" as:

... [A]ny oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation. (emphasis added) 18 U.S.C. §2510(2).

Examples of "oral communications" cited in the legislative history of Title III are communications uttered in one's home or one's office. 1968 U.S. Code Cong. and Adm. News 2178.

There are two references in 18 U.S.C. §2511 to communications by radio: One prohibits the interception of oral (not wire) communications by devices which transmit communications by radio or interfere with the transmission of such a communication (§2511(1)(b)(ii)); the other merely codifies the exception from criminal liability of FCC officials acting in the normal course of their duties. Neither provision purports to expand or amplify the definition of "oral communication" in 18 U.S.C. §2510(2). (Prior to the enactment of Title III, the exception of FCC officials was "implicit" in 47 U.S.C. §605. United States v. Sugden, 226 F.2d 281 (9 Cir. 1955), aff'd, 351 U.S. 916 (1956).)

The legislative history of Title III, while not completely clear on the point, nevertheless tends to equate the interception of "oral communications transmitted by radio" with electronic eavesdropping (bugging) to overhear private oral conversations. The legislative history cites Katz v. United States, 389 U.S. 347 (1967), in stating the definition of oral communication "is intended to reflect existing law." Katz involved the use

of an electronic eavesdropping device. "Wiretapping" is generally associated with the interception of wire communications. 1968 U.S. Code Cong. and Adm. News 2153-2156; 2177-2178; 2180-2181.

In the context of transmissions by radio, therefore, the definition of "oral communications" in 18 U.S.C. §2510(2) appears to contemplate private oral conversations intercepted by radio eavesdropping devices rather than the interception of communications transmitted by common carrier radio-telephone facilities. (Section 2511(1)(b)(1) would prohibit the use of leased or other telephone lines to transmit signals intercepted by eavesdropping devices. 1968 U.S. Code Cong. and Adm. News 2180.)

(vii) Overlapping Definitions

In neither 18 U.S.C. §§2510, et seq., nor 47 U.S.C. §605, does Congress reconcile the statutory definitions of "wire" and "oral" communications with "radio" communications in the radio-telephone context. This "overlap" was apparently not considered or even recognized by Congress. Even in United States v. Hall, supra, the court conceded that "the definition of wire communication is not free from ambiguity", and concluded that "[b]y reading the sections together, we can only conclude that the Congress did not mean that every conversation aided in any part by any wire would be a wire communication". 488 F.2d at 196-197.

Thus, we have two criminal statutes, one a felony, the other a misdemeanor, whose application must rest finally upon a reconciliation of the overlapping definitions of "wire communication" and "oral communication" in 18 U.S.C. §2510(1)(2), and "radio communication" in 47 U.S.C. §153(b).

The central question may be stated precisely: Which statute covers the interception of radio portions of common carrier radio-telephone communications between the United States and other countries?

Perhaps the most succinct indication of overall legislative purpose in Title III may be found, incidentally, in the definition of "oral communications" in 18 U.S.C. §2510(2):

... [A]ny... communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.

Obviously, the privacy of the wire portion of a common carrier radio-landline telephone communication is inherently greater than the radio portion. While such communication, as a whole, might conform with the technical definition of "wire communication" in 18 U.S.C. §2510(1), the radio portion fits equally the definition of "radio communication" set forth in 47 U.S.C. §153(b). As the Court observed in United States v. Hall, supra, the latter is infinitely more vulnerable to both inadvertent and intentional interception:

As with any broadcast into the air, the invitation to listen is afforded to all who can hear. In the instant case, the eavesdropper merely tuned their radio receivers to the proper station.

The legislative history emphatically states that 18 U.S.C. §§2510, et seq. "...is intended to protect the privacy of the communication". (Emphasis added.) 1968 U.S. Code Cong. and Adm. News 2178. The purpose of the statutory protection, therefore, is not to maintain the absolute inviolability of the means of communication, but to protect from interception those communications which are transmitted by private means. If the method of communication at a given point in transmission is not reasonably private, it is difficult to perceive a legislative intent to pretend privacy at that point merely because the means of communication elsewhere in the chain of transmission are private.

should be taken into account
A communication is only as private as the means of transmission employed at the point of interception. If the privacy of a communication is to be protected, the communication itself must first be private. If at some point in its transmission a communication may be intercepted over 30 per cent of the earth's surface with readily available and inexpensive radio equipment, the communication at that point can hardly be regarded as private. (See *iii, supra*.)

The legislative history further indicates that 18 U.S.C. §§2510, et seq., was intended to govern "the regulation of the interception of wire and oral communications", while 47 U.S.C. §605 was designed to "regulate the conduct of communications personnel" as well as prohibit the interception and divulgence, or use, or radio communications. 1968 U.S. Code Cong. and

Adm. News 2196-2197. Nothing in §605 indicates that common carrier radio communications are to be excluded from its coverage.

Notwithstanding the seemingly comprehensive coverage of radio communications by §605, however, the legislative history and definitions of wire and oral communications in 18 U.S.C. §2510 permit an initial construction of §§2510, et seq., to cover, inter alia, the interception of all radio-landline telephone communications transmitted, in part, by aid of common carrier wire (wire communications), and all "aural" radio-to-radio communications where there is a reasonable expectation such communications are not subject to interception (oral communications).

This construction of 18 U.S.C. §§2510, et seq., would leave §605 with jurisdiction over only the interception of "non-aural" radio-landline common carrier communications, and only those "aural" radio-to-radio communications which might reasonably be subject to interception. Such a construction would, of course, remove the interception of radio-landline telephone communications by "communications personnel" from the coverage of §605 which was specifically designed to "regulate the conduct of communications personnel". (Section 2511(2)(a)(i), Title 18, United States Code, expressly recognizes and contemplates that officers, employees and agents of communications common carriers may also intercept wire communications.)

The foregoing demonstrates, if nothing else, that the seemingly comprehensive coverage of "wire communication" in 18 U.S.C. 2511(1) is

neither all-inclusive nor free of ambiguity.

It is noted that the only specific reference to radio communications in the prohibitions of 18 U.S.C. §2511 is that which appears in §2511(1)(b)(ii) proscribing the interception of oral (not wire) communications by the use of devices which transmit communications by radio or interfere with the transmission of radio communications. This reinforces not only the contention that "oral communications" defined in 18 U.S.C. §2511(2) contemplate private oral conversations transmitted by radio eavesdropping devices; it also points up the omission of any similar prohibition against the use of radio devices to intercept "wire communications" as defined in 18 U.S.C. 2511(1).

(viii) Statutory Construction

When either of two statutes apply, the specific takes precedence over the general. Robinson v. United States, 142 F.2d 431 (8 Cir. 1944). Therefore, if 18 U.S.C. §2511 clearly applied to the interception of radio portions of radio-landline telephone communications, it should take precedence over the general coverage of 47 U.S.C. §605. Section §2511, however, is not unequivocal in its coverage, and since ambiguities in criminal statutes and conflicts in statutory construction must be resolved in favor of potential defendants, the misdemeanor statute would seem to apply. United States v. Bass, 404 U.S. 336, 348 (1971).

(ix) Prosecutive Options

The Government has the option to proceed under 47 U.S.C. §605. Where a single act violates more than one statute, the Government may elect to proceed under either. United States v. Burnett, supra.

(b) 47 U.S.C. §605

The second and fourth clauses of Section 605 prohibit, respectively, the interception and divulgence of radio communications, and the receipt of intercepted radio communications and divulgence or use for one's own benefit or the benefit of another.

Divulgence by one who did not personally intercept the communication, however, or cause another to do so, is not a violation of the second clause of Section 605; and use for the benefit of the Government is not the type of "use" prohibited by the statute. Pugach v. Klein, 193 F.Supp. 630, 640-641 (S.D.N.Y. 1961); United States v. Lewis, 87 F.Supp 970, 974 (D.D.C. 1950), reversed on other grounds, 184 F.2d 394 (D.C. Cir. 1950).

The Government has consistently taken the position that disclosure within the Executive Branch is not "divulgence" within the proscriptions of Section 605. Nardone v. United States, 302 U.S. 379 (1937); United States v. Butenko, 494 F.2d 593, 600 (3 Cir. 1974), cert. denied, 419 U.S. 881 (1974).

In any event, "person" in Section 605 does not include law enforcement officers acting in the normal course of their duties. 1968 U.S. Code

Cong. and Adm. News 2197. The second clause of Section 605 prohibits any "person" from intercepting and divulging to "any person". It would seem, therefore, that disclosure by NSA personnel to law enforcement officers of EDD/DEA would not constitute "divulgence" within the statute.

(c) Presidential Authorization
(18 U.S.C. §2511(3))

On October 24, 1969, President Nixon created the White House Task Force for Narcotics Control and reportedly announced a decision to make narcotics a matter of foreign policy, and further directed the Director of Central Intelligence to contribute to the maximum extent possible in the collection of foreign intelligence related to traffic in opium and heroin. (Tab T2)

In August, 1971, the President created the Cabinet Committee as International Narcotics Control (which included, inter alia, the DCI (CIA), the Attorney General, Secretary of Defense, et al.) and directed that all Federal offices, department and agencies cooperate with the CCINC in carrying out its functions, including the coordination of all diplomatic, intelligence and Federal law enforcement programs and activities of international scope. (Tab T5) President Nixon also issued additional orders and made additional statements directing the mobilization of the full resources of the Federal Government to gather intelligence on international drug traffic. (See III (B), supra.)

President Ford was recently quoted as having designated the illicit export of opium to the United States as a "threat to our national security." See III (B)(6), supra.

Former Secretary of Defense Melvin Laird stated that during the Viet Nam Conflict, he regarded the importation of drugs into the United States to be a matter affecting the national security because it undermined the capability of the Armed Forces during a period of national emergency. (Tab X4)

(For specific sources of purported authorization, see III, supra.)

(d) Willfulness

See V(C), supra.

2. Interceptions of International
Non-Voice Communications

(a) 18 U.S.C. §2511

(i) Interception

The legality of the interception of non-voice communications turns upon the interpretation of "intercept" as defined in 18 U.S.C. 2510(4):

(4) "intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

The statute thus restricts the definition of "intercept" to "aural acquisition", and the legislative history specifically excludes all other means of acquisition:

... Other forms of surveillance are not within the proposed legislation... The proposed legislation is intended to protect the privacy of the communication itself and not the means of communication. 1968 U.S. Code Cong. and Adm. News 2178.

The dictionary defines "aural" as "of or relating to the ear or sense of hearing." The words "aural acquisition", literally translated, means to come into possession through the sense of hearing. Smith v. Wunker, 356 F.Supp. 44, 46 (S.D. Ohio 1972).

The legislative history further amplifies the intended scope of "aural interceptions":

Paragraph (4) defines "intercept" to include the aural acquisition of the contents of any wire or oral communication by any electric, mechanical, or other device. Other forms of surveillance are not within the proposed legislation. See Lee v. United States, 47 S.Ct. 746, 274 U.S. 559 (1927); Corngold v. United States, 367 F.2d (9th 1966). An examination of telephone company records by law enforcement agents in the regular course of their duties would be lawful because it would not be an "interception". (United States v. Russo, 250 F.Supp. 55 (E.D. Pa. 1966)). The proposed legislation is not designed to prevent the tracing of phone calls. The use of a "pen register", for example, would be permissible. But see United States v. Dote, 371 F.2d 176 (7th 1966). The proposed legislation is intended to protect the privacy of the communication itself and not the means of communication. 1968 U.S. Code Cong. and Adm. News 2178.

The foregoing clearly excludes from the coverage of 18 U.S.C. §2511 all communications transmitted mechanically, i.e., transmitted by signals independent of sound, e.g., electrical pulses.

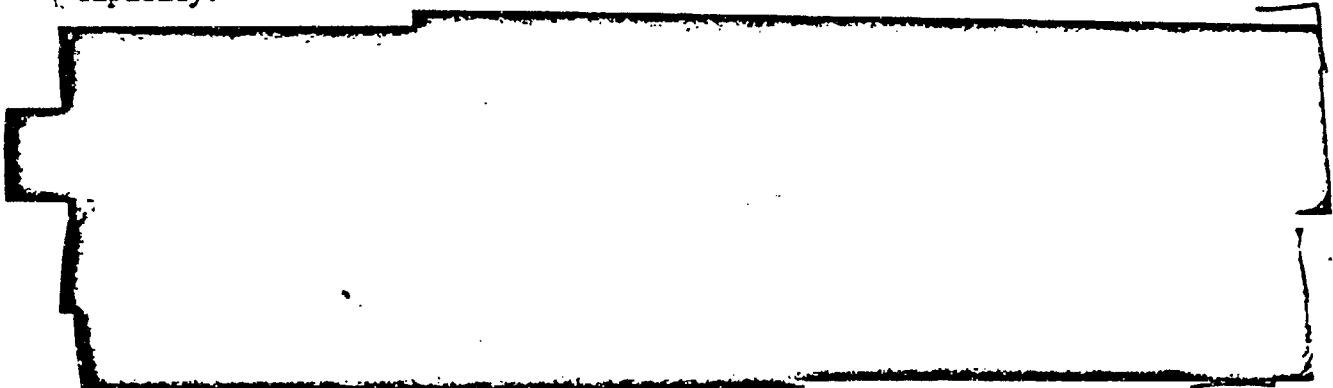
(ii). "Aural"

"Aural acquisition" seems to have been used by the Congress neither as a term of art nor as a term of technology. The words "acquisition... through the use of any... device" suggest that the central concern is with the activity engaged in at the time of the communication which causes such communication to be overheard by uninvited listeners, i.e., the contemporaneous acquisition of the communication. It is the act of contemporaneous surveillance (by hearing, recording, or otherwise) which was at the center of congressional concern. United States v. Turk, 526 F.2d 654, 658-659 (5 Cir. 1976). This interpretation of "aural acquisition" is reinforced by 18 U.S.C. 2511(1)(c) which prohibits the subsequent disclosure of an intercepted communication.

"Aural acquisition", would seem to include, for example, the de-channeling of tape recordings of intercepted multi-channel "sound" communications. In such cases, the acquisition of the intelligible contents of a communication would not necessarily have to be contemporaneous with the interception and acquisition of the primary or "garbled sounds". In short, "aural acquisition" would appear to generally cover the interception of sounds while in the process of transmission.

(iii) Teletype and Telex Communications

Teletype and telex transmissions are clearly non-aural. Teletype technology essentially connects two typewriter keyboards by pulses of electrical energy transmitted by wire and/or radio. Telex technology maximizes the utility of teletype facilities by increasing the transmitting capacity.



(b) 47 U.S.C. §605

(i) Divulgence

The interception of non-aural communications is covered, if at all, by 47 U.S.C. §605, which requires divulgence, or use, in addition to interception. There is absolutely no indication that Congress contemplated §605 situations where interceptions were not accompanied by divulgence. United States v. Butenko, 494 F.2d 593, 600 (3 Cir. 1974), c.d., 419 U.S. 881 (1974).

The majority in Butenko observed that "restricting any divulgence to members of the Executive Branch.... does not necessarily mean that the

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surveillance and such divulgence does not run afoul of §605", but the dissenting Chief Judge stated that while the question did not have to be resolved in that case, perhaps such divulgence does not violate §605 "because the federal officers are really acting as agents of the executive in making the interception and the relevant "person" to be viewed as interceptor is, thus, the executive; divulgence to other agents of the executive, who receive the information in such capacity, hence would not violate the statute because the divulgees would be part of the same "person" as the divulgers." This has been the consistent position taken by the Government in such cases. Nardone v. United States, 302 U.S. 379 (1937); United States v. Butenko, supra.

Whatever the validity of the above position; the Government could hardly prosecute one of its own agents for divulging the contents of an intercepted communication within the Executive Branch in reliance upon the Government's long-standing interpretation of the statute. Furthermore, Section 605 does not apply to law enforcement officers acting in the course of their normal duties. 1968 U.S. Code Cong. and Adm. News 2197. Disclosure by NSA within the Executive Branch, particularly to ENDD, Secret Service and FBI agents is, therefore, not proscribed by the statute.

(ii) Use

Section 605 must face the canon of strict construction in favor of the accused. It is one thing to interpret the statute in favor of the accused,

but quite another to expand its meaning where to do so works against the accused. A strict construction in favor of the accused impels the conclusion that the provision "use... for his own benefit or for the benefit of another not entitled thereto", means another person and does not include use for the benefit of the Government. Plainly, such use is not for the government agent's own benefit. Pugach v. Klein, 193 F.Supp. 630, 640-641 (S.D.N.Y. 1961); United States v. Lewis, 87 F.Supp. 970, 974 (D.D.C. 1950), reversed on other grounds, 184 F.2d 394 (D.C. Cir. 1950).

(iii) Interception and Divulgence
or Use By Different Parties

Absent a conspiracy, mere divulgence by one who did not personally intercept the communication, or cause another to do so, is not a violation of the second clause of Section 605. Pugach v. Klein, supra. By the same reasoning, the "receipt and divulgence" prohibitions of the first clause of Section 605, and the "receipt and use" proscriptions in the third clause, would seem also to require that receipt and divulgence (or use) be accomplished by the same person to constitute an offense under §605.

(c) Presidential Authorization

See III, supra.

(d) Willfulness

See V(C), supra.

B. Receipt of "Cable Traffic" from International Communications Carriers (SHAMROCK and Drop-Copy Operation)

1. 47 U.S.C. §605

This activity is covered, if at all, by the first clause and/or third clause of 47 U.S.C. §605 which prohibit, generally, the receipt and divulgence (except upon demand of lawful authority, etc.) of interstate or foreign communications by wire or radio; and the receipt and use of radio communications.

Possible Violations of §605 involve persons in two general categories:

- (1) commercial communications personnel; and (2) government agents and officials.

(a) Communications Personnel

The new Section §605 is designed to regulate the conduct of communications personnel. 1968 U.S. Code Cong. and Adm. News 2197. As noted above, however, §605 apparently requires that both the willful receipt (or assistance in receiving) and the willful divulgence and/or use, be accomplished by the same person, and "use" by a Government agent for the benefit of the Government is not the type of "use" contemplated in the proscriptions of the statute. Pugach v. Klein, supra; United States v. Lewis, supra.

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In addition to their reliance on the foregoing, communications personnel involved in SHAMROCK and the Drop-Copy Operation may contend their assistance to NSA and the FBI was in response to requests made under the Presidential power recognized by 18 U.S.C. §2511(3), i.e., "on demand of lawful authority" and, therefore, within the exceptions enumerated in §605.

The FBI asserts that the legislative history of §605 indicates Congress intended the phrase "on demand of lawful authority" to be as inclusive as the similar provision of the Interstate Commerce Act of 1887 from which the Communications Act of 1934, in part, was taken. (Tab 00) The Interstate Commerce Act of 1887, as amended in 1910 to prohibit the disclosure of communications transmitted by common carriers, provided that nothing therein should be construed to prevent the giving of information in response to "any officer or agent of the Government of the United States, or of any State or Territory, in the exercise of his powers, or to any officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crime..."

The communications personnel might also argue they were de facto agents of the United States Government and disclosed only to agents within the Executive Branch which does not constitute "divulgence" within the meaning of Section 605. United States v. Butenko, supra.

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(b) Government Agents and Officials

Agents and officials of NSA and the FBI who were involved in the daily conduct of SHAMROCK and the Drop City Operation will perhaps assert they never received or assisted in receiving any of the communications furnished to them, but rather obtained the communications only after the receipt of same by communications personnel. They will likely contend also that there was no "divulgence" because dissemination was confined to a small segment of the Executive Branch.

Those officials who negotiated or maintained the informal agreements between the Government and the communications carriers were not the same persons who obtained and disseminated the actual communications within the Executive Branch. They will, of course, seek to avoid the application of Section 605 by claiming not to have received and divulged any communications themselves. As for criminal conspiracy, they will probably attempt to prove an implied delegation of Presidential power under 18 U.S.C. 2511(3).

2. Presidential Authorization

See III, supra.

3. Willfulness

See V(C), supra.

C. Interception of Domestic Communications
In Testing Electronic Equipment

1. 18 U.S.C. §2511 and 47 U.S.C. §605

All interceptions which are known to have occurred within the five-year statute of limitations were interceptions of "radio" communications, i.e., the radio portions of radio-telephone communications which were not "divulged" within the meaning of 47 U.S.C. §605. The same defenses set forth in IV(A), supra, may be raised with respect to this activity.

2. Presidential Authorization

See III(E) (4), and III (F) (6).

3. Willfulness

See V(D), supra.

VII. SUMMARY OF POSSIBLE VIOLATIONS AND DEFENSES

A. Recapitulation of Inquiry

The Rockefeller Commission Report raised questions concerning seven areas of CIA-related electronic surveillance activity: CIA personnel security, activities of U.S. dissidents, toll records of telephone calls between the U.S. and a hostile country, the interception of international narcotics trafficker's telephone communications, electronic equipment testing, a survey of the potential capability of a hostile foreign power to intercept U.S. communications, and CIA assistance to the Secret Service and local police departments (pp.1-13, supra).

[REDACTED]

However, our inquiry revealed the following eleven additional areas of questionable activity involving the CIA, NSA and FBI: NARCOG, LPMEDLEY, [REDACTED] over-seas intercepts, [REDACTED] MINARET, [REDACTED] SHAMROCK, [REDACTED] and the FBI drop-copy operation (pp.14-39, supra). Five of these may also contain the elements of Federal criminal offenses, i.e., MINARET (pp.26-29, supra), [REDACTED] SHAMROCK (pp.32-36, supra), and the FBI drop-copy operation (p.39, supra).

Eight specific electronic surveillance operations thus require prosecutive evaluation.

1. [REDACTED]

From October 1972 to January 1973, at NSA's request, the CIA intercepted the radio portions of targeted radio-telephone communications between Latin America and the United States for the purpose of gathering intelligence on international narcotics trafficking. [REDACTED]

[REDACTED] the intelligence product was furnished to NSA which, in turn, forwarded it to BNDD.

If the radio portions of international radio-telephone communications are deemed "wire communications" (see pp. 139-140, supra), the [REDACTED] would be in clear violation of 18 U.S.C. §2511(1), but for the apparent blanket approval of such interceptions by Attorneys General and the Secretary of Defense in 1971 and 1972 (pp.81-84, supra). Such approval, together with the explicit Presidential insistence that CIA contribute to the "maximum extent" and "to mobilize its full resources to fight the international drug trade" (pp. 46, 58, 112, supra), could be construed as Presidential direction and authorization under 18 U.S.C. §2511(3). This defense is particularly buttressed by prior Presidential declarations that narcotics control is a matter of "foreign policy" (p.46, supra); that it is "imperative that the illicit flow of narcotics and dangerous drugs into this country be stopped as soon as possible" (p.47, supra); that illicit drugs are a "menace to the general welfare of the United States" (p.46, supra); that "winning the battle against drug abuse is one of the most important, the most urgent national priorities confronting the United States today" (p.57, supra); that "keeping dangerous drugs out of the United States [is] just as important as keeping armed enemy forces from landing in the United States" (p.58, supra). Such Presidential language could be easily construed as equating narcotics control with national security.

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Congress has also recognized the need for international narcotics intelligence and the general propriety of utilizing CIA and NSA resources to obtain it. (pp.49, 63, supra; Tab T7)

Although the foregoing does not conclusively establish legitimate authorization, it sufficiently clouds the issue to make proof of willfulness on the part of subordinates essentially impossible. Likewise, the purported "authorization" by the President, Attorneys General and Secretary of Defense is so general, so amorphous, that it would be impossible to prove beyond a reasonable doubt that either of them specifically "authorized" [REDACTED]

It thus appears that no real probability exists for convicting anyone involved [REDACTED] Consequently, it would not seem to warrant further prosecutive pursuit.

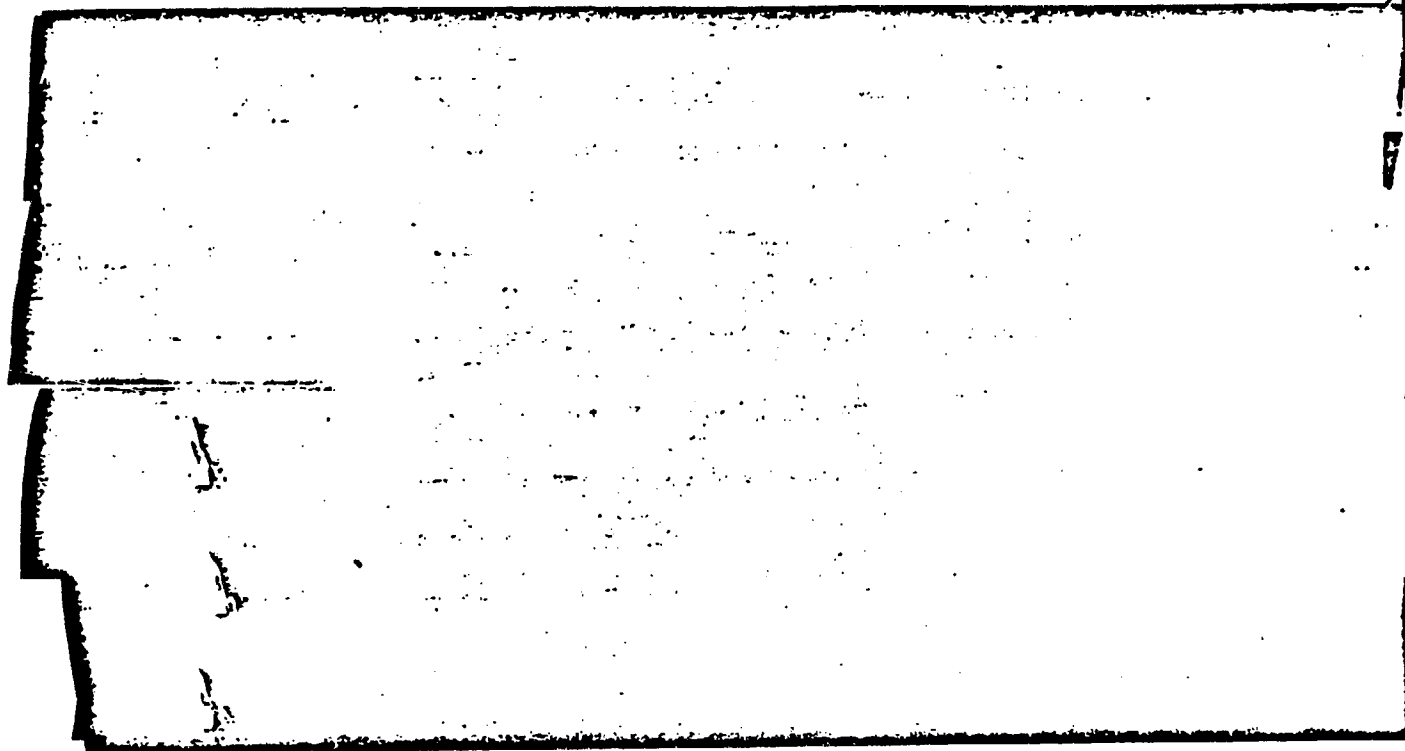
(See Summary Outline, Tab D, for complete listing of possible defenses.)

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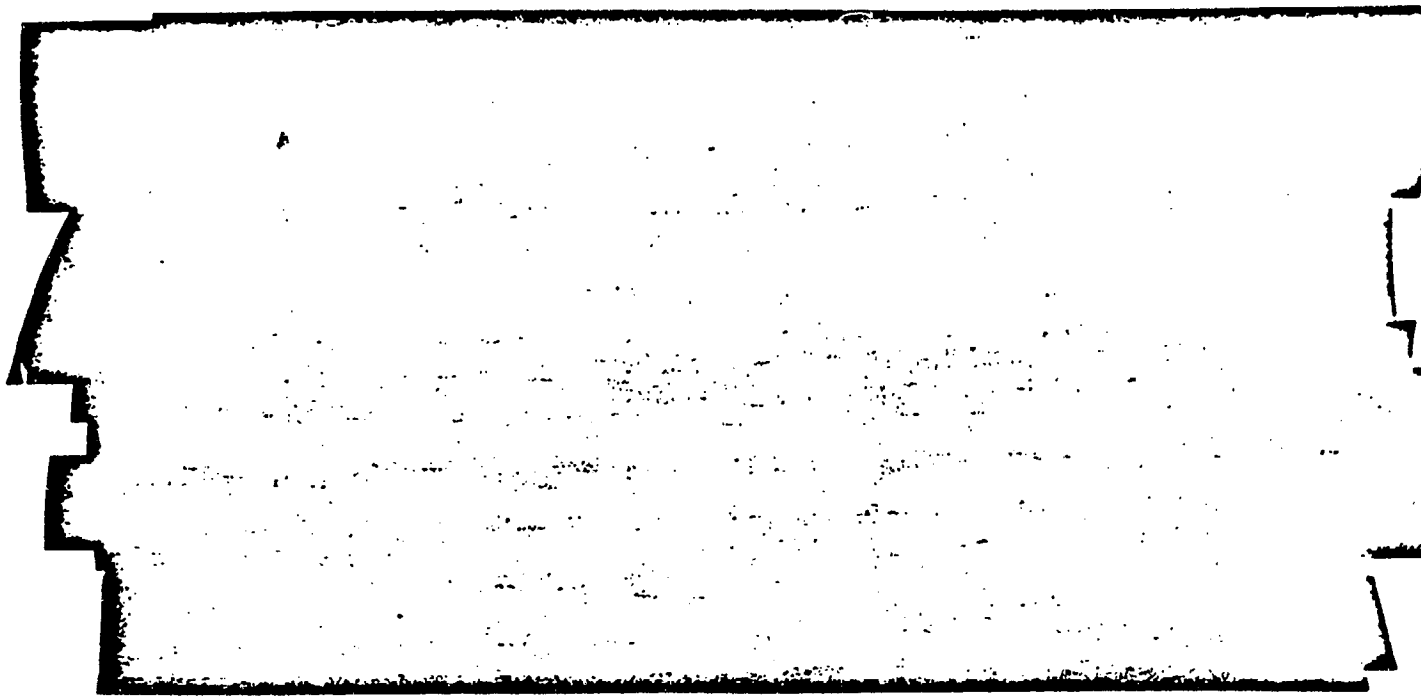
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(See Summary Outline, Tab F4, for additional detail.)

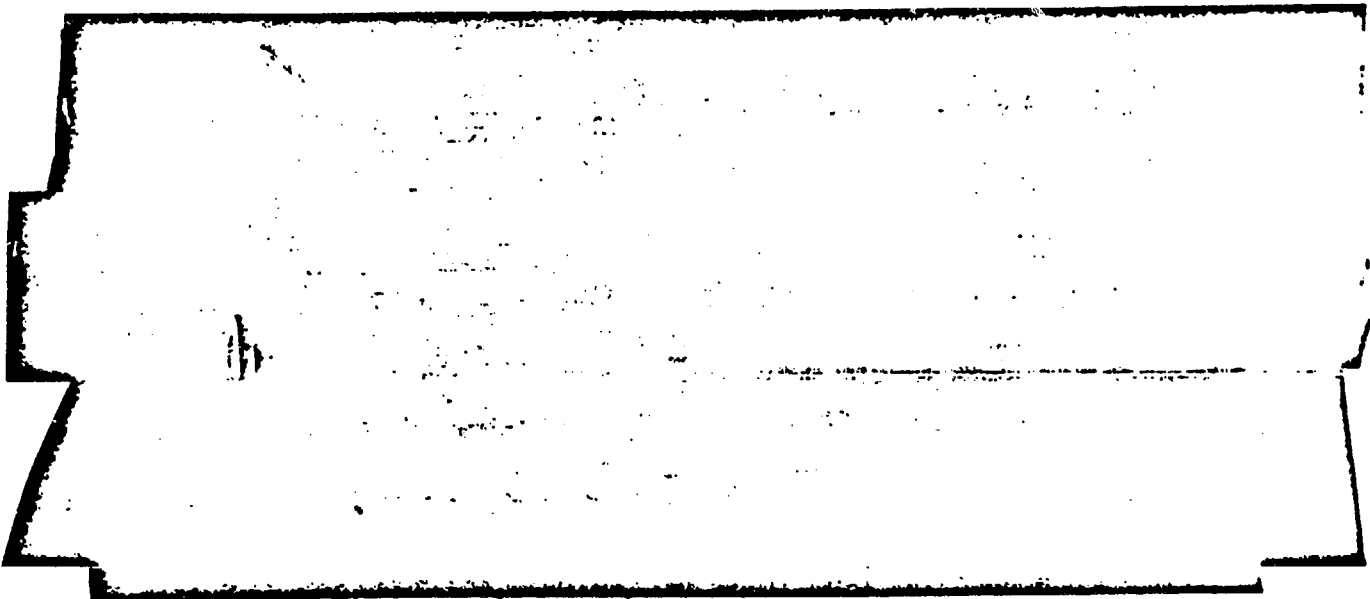


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HANDLE VIA COMINT CHANNELS

4. MINARET

The chartering of MINARET on July 1, 1969, formalized NSA's de facto collection and dissemination of intelligence concerning Presidential protection and foreign influences on domestic organizations and individuals which might create civil disturbances and/or undermine the national security. The Attorney General advised the PFIAB on February 5, 1971 that electronic surveillance to obtain intelligence concerning violence-prone groups was clearly within the jurisdiction of the Presidential responsibilities for maintaining law and order (pp.107, supra). Such intelligence was gathered and distributed by NSA to Federal consumer agencies, i.e., the CIA, FBI, Secret Service, ACSI, DIA, and State Department, all of whom levied requirements on NSA under NSCID 6 (pp. 78, supra). ENDD levied narcotics intelligence requirements on NSA in April 1970. [REDACTED]

MINARET intelligence, except one category of international voice communications involving narcotics, was obtained incidentally in the course of NSA's interception of aural and non-aural (e.g., telex) international communications, and the receipt of GCHQ-acquired telex and ILC cable traffic (SHAMROCK) [REDACTED]

Possible violations in MINARET are (1) aural acquisition (and/or use, disclosure, etc.) of wire and oral communications (18 U.S.C. §2511); and (2) receipt or interception and divulgence or use of radio communications (47 U.S.C. §605).

In conformity with NSA's one-terminal rule (p.61, supra), all MINARET communications apparently had at least one terminal in a foreign country and,

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excluding SHAMROCK communications, were obtained through the interception of radio portions of international communications from sites both within and without the United States.

On November 6, 1975, the Attorney General noted in his testimony before the Senate Select Committee that it is arguable that "if matters are picked up out of the air, so to speak, as waves of some kind across the ocean, that there is no reason for people to assume that the conversations are private and therefore the fourth amendment does not apply". Hearings Before the Select Committee to Study Governmental Operations With Respect to Intelligence Activities of the Senate, 94th Cong., 1st Sess., V5, pp.115-116 (1975). Although the Attorney General expressly declined to make such an argument because "it goes too far", it nonetheless remains available as a tentative and plausible defense. (See pp.128-142, supra.)

Assuming, however, such defense is not viable, the dissemination of intelligence incidentally derived from clearly legitimate NSA operations to "provide for the SIGINT mission of the United States" (p.77, supra) appears to be lawful under the "plain view" doctrine (p.125, supra), particularly in view of the general absence of statutory restrictions on NSA intercept activities.

Our inquiry confirms the following findings of the Senate Select Committee regarding the lack of statutory restrictions on NSA:

* * *

... [N]o existing statutes control, limit or define the signals intelligence activities of NSA....

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No statute or executive directive prohibits NSA's monitoring a telephone circuit with one terminal in the United States.

* * *

It is important to note that the decision to terminate the watch list was ultimately the administrative decision of an executive agency. There is no statute which expressly forbids such activity, and no court case where it has been squarely at issue. Without legislative controls, NSA could resume the watch list activity at any time upon order of the Executive.... (S.Rep. No. 94-755, 94th Cong., 2nd Sess., Book ____, pp.736, 756, 761 (1976).

The apparent lack of statutory restriction on NSA intercept activities was reinforced by a memorandum from NSA General Counsel to the Office of the NSA Director on July 24, 1968 reporting that the enactment of 18 U.S.C. §2511(3) on June 19, 1968 removed "any doubt as to the legality of SIGINT... activities of the Executive Branch of the Government". (p.85, supra; Tab Y2)

NSA's purposeful interception of the radio portions of international radio-telephone communications to obtain narcotics intelligence for BNDD began in September 1970 and continued until June 1973. Apparently, NSA only intercepted narcotics communications having one terminal (at least) in a foreign country. Consequently, this activity conformed with NSA's long-standing "one-terminal" rule (p.81, supra), Presidential priorities (pp.46-58, 109, 111-112, supra), possible USIB approval (p.97, supra), "ground rules" approved in 1971 and 1972 by Attorneys General and the Secretary of Defense (pp.82-84, supra), and the "national security" nature of drug trafficking during the Viet Nam War (Tab X4).

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The broad, sweeping SIGINT responsibilities and powers of NSA, combined with vague or non-existent restrictions on NSA in exercising that power to carry out such responsibilities, would seem to render further prosecutive pursuit of MINARET futile. The plain view doctrine appears to legitimize the incidentally-acquired MINARET intelligence, and the aforementioned circumstances of gathering the narcotics intelligence for ENDD makes proof of willfulness highly improbable, if not impossible.

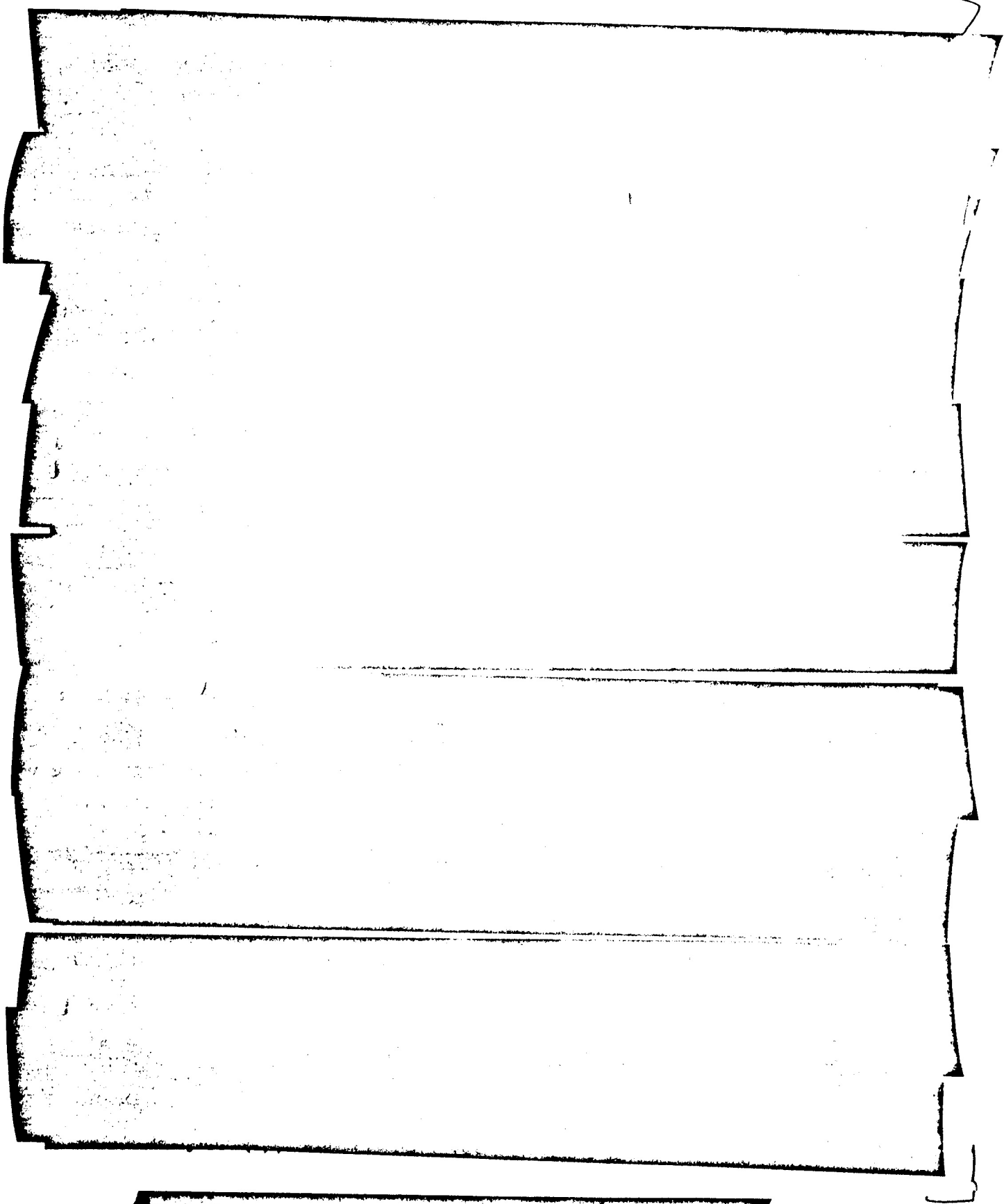
(See Summary Outline, Tab N, for additional analysis and detail.)

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HANDLE VIA COMINT CHANNELS



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HANDLE VIA COMINT CHANNELS

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6. SHAMROCK

In SHAMROCK, the NSA gathered international non-aural communications from ILC carriers (principally ITT, RCA and WUI) from 1957 to May 1975. NSA inherited this operation from military agencies which began collecting cable traffic during WW II and continued thereafter as essential to the national security with the approval of Secretaries of Defense, Attorney General Tom Clark and President Truman.

The method of obtaining ILC communications varied with changing technology and circumstances, but from the mid-1960s to May 1975, NSA employees received or had access to virtually all ILC traffic which passed through the New York City offices of RCA and ITT. The offices of WUI in New York City and Washington, D.C. furnished NSA with microfilm of [REDACTED] and possibly other) ILC communications until 1969. The WUI communications were selected out and microfilmed for NSA by WUI employees. (The offices of RCA, ITT, WUI and other ILC companies in several other cities also contributed to SHAMROCK at various times.)

NSA also requested and received cable traffic from the FBI which the latter obtained from RCA, ITT and WUI until the termination of its "Drop-Copy Operation" in April 1973.

In about 1967, NSA began extracting domestic intelligence from the ILC communications (magnetic tapes) received from RCA and ITT. This was done without the knowledge of RCA or ITT and continued until the termination of [REDACTED]. Such domestic intelligence was disseminated to consumer agencies pursuant to the MINARET and [REDACTED] charters.

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Notwithstanding the extraction of MINARET and [REDACTED] intelligence in addition to [REDACTED] NSA officials contend that it constituted only a small portion of the total traffic received. The remainder (90%+) was not used in any respect in an effort to minimize the NSA intrusion. 7

SHAMROCK involves possible violations of 47 U.S.C. §605. (Section 2511 of Title 18, United States Code, does not apply because none of the communications were apparently acquired by "aural" means. Rather, they were mechanically transmitted and received through pulses of electrical energy, e.g., telex.)

NSA finds support for conducting its SHAMROCK operation in the following: NSA's "inheritance" of the project which was continued after WW II at the instance of the Secretary of Defense, Attorney General and the President (pp.32-33, supra); the purported knowledge and receipt of SHAMROCK-type communications by the President and his National Security Advisor from 1966 to 1969 (p.41, Tab N); Presidential authorization (pp.46-60, 106-113; 144, supra); knowledge and approval of the Attorney General and PFIAB in 1971 (pp.107-108, supra); knowledge and tacit approval from 1969 to 1973 of the Secretary of Defense (p.33, supra); and the mandate of NSCID 6 (pp.76-80, supra). (NSA contends that the exclusion of unencrypted written communications from its mandate under NSCID 6 is limited to mail and communications other than those sent electronically. S.Rep. No. 94-755, 94th Cong., 2nd Sess., Book ___, pp.737-738 (1976).)

If NSA had prima facie authority to collect NSA traffic from ILC carriers for national security purposes, it may be contended that domestic intelligence incidentally derived therefrom was lawfully obtained under the "plain view" doctrine. (See p.125, supra)

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Section 605 of Title 47 prohibits (1) divulgence by anyone receiving any foreign communication by wire or radio, except upon demand of lawful authority; or (2) receipt and use of such communication by a person not entitled thereto.

In addition to the purported "authority" defenses above, potential SHAMROCK defendants may assert (1) there was no divulgence outside the executive branch and, therefore, no divulgence within the meaning of §605; (2) there was no divulgence or use by any person who actually received communications; and (3) use for the benefit of the Government is not the type of "use" contemplated in §605 (pp.143-153, supra). Thus, the argument may be made that no Federal criminal statute covers the SHAMROCK activity. Section 605 does not apply to FBI, BNDD or other law enforcement personnel (pp.133-132, supra), nor to the mere receipt of communications and divulgence within the executive branch.

While the foregoing defenses do not clearly absolve the participants, they would seem to provide the basis for a sufficient showing of good faith and lack of willfulness to preclude successful prosecution of NSA, FBI and other consumer agency personnel involved. (See pp.121-125, supra.)

(See Summary Outline, Tab P, for additional detail.)

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7. FBI Drop-Copy Operation

From 1941 to April 18, 1973, the FBI obtained copies of international "cable traffic" from ILC carriers for purported national security purposes, [REDACTED] By 1947, the FBI was receiving the cable traffic of 14 countries from RCA, WUI and Mackay Radio. In 1947 and 1949, the Secretary of Defense assured RCA, ITT and WUI that the assistance they were providing was essential to the national security of the United States, and both the President and Attorney General concurred in the request that it continue.

When the Drop-Copy Operation was terminated in 1973, the FBI was obtaining the "raw" cable traffic of 21 countries from the Washington, D.C. offices of ITT, RCA and WUI. The traffic of 10 of these countries was obtained for NSA.

During the 30-odd years of the Drop-Copy Operation, the FBI obtained cable traffic from various offices of six ILC companies in New York City San Francisco, Los Angeles, Portland and Washington, D.C.

It appears that as late as March 22, 1971, the PFIAB and Attorney General were aware of the FBI's operation (p.107, supra). The FBI finds authorization for its Drop-Copy Operation in such knowledge and acquiescence; in NSCID 6 which authorizes the NSA Director to issue direct mandatory assignments to any agency engaged in SIGINT operations (p.78, supra); and in the FBI's own authority by virtue of Executive Order to conduct counter-intelligence operations within the United States. (Tab R4)

Possible violations and defenses are the same in the Drop-Copy Operation as in SHAMROCK, supra.

(See Summary Outline, Tab R, for further detail.)

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VIII. CONCLUSIONS AND RECOMMENDATIONS

This Report does not present particulars upon which affirmative prosecutive decisions may be made in specific cases. It rather provides the legal and factual detail for determining whether inquiry into specific activities should be terminated for lack of prosecutive potential or further pursued by grand jury. (If additional evidence of significant prosecutive value exists, it is not likely to be obtained without a grand jury.)

The writer recommends that the inquiry be terminated in all respects for lack of prosecutive potential. There appears to be little likelihood, if any, that convictions could be obtained on the basis of currently available evidence or evidence which might reasonably be developed.

The investigation has not revealed a single instance in which intelligence obtained by means of electronic surveillance was gathered or used for personal or partisan political purposes. The participants in every questionable operation, however oblivious or unmindful, appear to have acted under at least some colorable semblance of authority in what they conscientiously deemed to be the best interests of the United States. While they may be regarded in current perspective as having abused their broad discretionary power on occasion, that ill-defined power was conferred upon them and their agencies with the levy of sweeping legislative and executive requirements, e.g., the National Security Act and NSCIDs. If the intelligence agencies possessed too much discretionary authority with too little accountability, that would seem to be a 35-year failing of Presidents and the Congress rather than the agencies.

In addition to the previously enumerated defenses which may be invoked in the event of prosecution, there is likely to be much "buck-passing" from subordinate to superior, agency to agency, agency to board or committee, board or committee to the President, and from the living to the dead. The defense

may be expected to subpoena every tenuously-involved government official and former official to establish legitimate authorization or convoluted theories or purported authorization. While the high office of prospective defense witnesses should not enter into the prosecutive decision, the confusion, obfuscation and surprise testimony which might result cannot be ignored.

Other practical considerations include the implications and complexities of providing discovery of national security materials (e.g., NSC, PFIAB, DOD, and White House documents and records), as well as sensitive foreign intelligence-gathering methodology and technology. These considerations become particularly acute when weighed against the minimal chances of sustaining the technical proof of violations and the probable lack of juror enthusiasm for convicting those whom the defense may plausibly portray as dedicated employees who only followed orders in trying to protect the national interest, keep heroin out of the United States, etc.

The above observations are made with full appreciation that the subject matter is an international cause celebre involving fundamental constitutional rights of United States citizens. While the violation of those rights, whether intentional or inadvertent, cannot be condoned, the prosecution of alleged malefactors without any reasonable probability of conviction would seem to be equally indefensible.

It is suggested that the remedy for the peculiar wrongs discussed herein might be more effectively and appropriately sought in corrective legislation and administrative revision than in the pursuit of punitive and retributive measures which are likely to fail. To that end, the following innovations appear to be as essential as they are obvious:

1. Governmental agencies charged with the research and development of electronic equipment essential to the national security should be provided with clearly defined authority and procedures for testing such equipment against appropriate communications systems.
2. Consideration should be given to seeking specific congressional and presidential designation of certain international criminal activities as matters affecting the national security (e.g., international narcotics trafficking, gun-running, etc.) for purposes of foreign intelligence-gathering. (It is pure folly, for example, to pay millions of dollars to Turkey to reduce the production of opium destined (initially) for Corsica, while at the same time deliberately denying U.S. law enforcement agencies the benefit of our most sophisticated and effective apparatus for gathering intelligence on heroin en route to the United States.)
3. National security intelligence agencies should be authorized to provide appropriate U.S. law enforcement agencies with criminal intelligence incidentally obtained in the exercise of their lawful functions, including information indicating criminal activity on the part of U.S. citizens. (There is no rational basis for protecting U.S. citizen-criminals from the consequences of such 'plain view' evidence.)
4. An effort should be made (consistent with the constitutional rights of criminal defendants) to secure legislation and/or rules changes to prevent the public identification of national security agencies as the source of criminal intelligence incidentally obtained in the exercise of their lawful functions, at least where such evidence is not introduced at trial.
5. The authority of the CIA, NSA and FBI to perform their respective missions in the field of electronic surveillance should be clearly delegated and delineated with specific procedures prescribed for the lawful exercise of that authority.

6. The Office of General Counsel for each intelligence agency should be staffed with one or more attorneys with expertise in electronic surveillance law and Federal criminal law and procedure.
7. Agency personnel should be required to consult their General Counsel and confirm, in advance, the legality of all electronic surveillance projects.

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THE END



Approved For Release 2004/03/12 : CIA-RDP80M00165A001900130003-8

Department of Justice

FOR IMMEDIATE RELEASE
JANUARY 14, 1977

AG
202-739-2028

NOTE TO NEWS MEDIA:

Attached, for immediate release, is a copy of the report of the Department of Justice concerning its investigation and prosecutorial decisions with respect to CIA mail-opening activities in the United States.

Attachment

EMPLOYEE BULLETIN

ATTORNEY GENERAL'S DECISION NOT TO PROSECUTE REGARDING CIA
MAIL INTERCEPT PROGRAMS

1. On 14 January 1977, the Department of Justice issued the Attorney General's report concerning its investigation and prosecutorial decisions with respect to CIA mail opening activities in the United States. The essence of the report is the decision not to prosecute individuals who participated in programs involving the opening of mail to and from foreign countries during the period from 1953 through 1973. Copies of the report will be available for examination by interested employees in the OGC and CIA Libraries. However, in order to insure that all employees are made aware of the high professional and ethical principles which characterized the Attorney General's decision, the factors considered and the method by which the decision was reached, and the standards governing current conduct, the report is summarized in this Bulletin.

2. The Department of Justice inquiry was initiated on 11 June 1975, at the direction of the President. The investigation was conducted by the Criminal Division, which concluded in August 1976, that convictions were unlikely. Due to its importance, the Attorney General requested a special review of this conclusion and this was performed by experienced criminal lawyers in both the Criminal and Tax Division as well as three experienced United States Attorneys, two outside consultants, the Solicitor General, and the Attorney General, Deputy Attorney General and Assistant Attorney General for the Criminal Division.

3. The Department concluded that, although such activities would be clearly unlawful if conducted today, a prosecution of the individuals involved would be unlikely to succeed because of the uncertain state of the law at the time and the dissipation of important evidence due to the passage of time. As is stated in the report:

It would be mistaken to suppose that it was always clearly perceived that the particular mail opening programs of the CIA were obviously illegal. The Department believes that this ... is a serious misperception of our Nation's recent history, of the way the law has evolved and the factors to which it responded - a substitution of what we now believe is and must be the case for what was.

4. The fact that during the period of these operations there was a lack of clear judicial guidance, a high degree of public concern as to foreign threats, and a belief that the Constitution provided extremely broad Presidential power to authorize collection of intelligence in response to the exigencies of national security, led the Justice Department to conclude the argument is not unreasonable that individuals should not be prosecuted when the rules of law governing their conduct have changed during and subsequent to the activities in question. While the mail opening program was not authorized as carefully as is now Constitutionally required, the Department acknowledged prevailing principles have evolved rapidly during the past two decades and would have sounded strange to those who initiated and continued the program during the 1950's and 1960's. In these circumstances, it would be difficult to establish personal guilt since,

In a very real sense, this case involves a general failure of the government, including the Department of Justice itself, over the period of the mail opening programs ever clearly to address and to resolve for its own internal regulation the constitutional and legal restrictions on the relevant aspects of the exercise of Presidential power.

5. Consequently, prosecution of individuals in such circumstances would be hypocritical and appear to constitute selective prosecution. An acquittal due to this appearance might create the misimpression that such activities are not illegal or that a jury may not be willing to apply rigorous legal principles in such cases.

6. Since the primary concern of the Department of Justice at this time is proper governmental operation from this point forward, the goal of the report is the elimination of any legal ambiguities in this regard. The Department's legal conclusion that "any similar conduct undertaken today or in the future would be considered unlawful," and the statement that the Department would not hesitate to prosecute any persons, whatever their position, who become involved in such a program, should serve as a guide to future conduct for all Agency employees.

Report of the Department of Justice Concerning
Its Investigation and Prosecutorial Decisions
with Respect to Central Intelligence Agency Mail
Opening Activities in the United States

The Department of Justice has decided, for reasons discussed in this report, not to prosecute any individuals for their part in two programs involving the opening of mail to and from foreign countries during the years 1953 through 1973.

On June 11, 1975, the President transmitted to the Attorney General the Report of the Commission on CIA Activities within the United States (the Rockefeller Commission). The President asked the Department of Justice to review the materials collected by the Commission, as well as other relevant evidence, and to take whatever prosecutorial action it found warranted. At the direction of the Attorney General, the Department's Criminal Division conducted an investigation to determine whether any government officer or employee responsible for CIA programs described in Chapter 9 of the Commission Report, involving the opening of mail taken from United States postal channels, or responsible for related or similar activities of the Federal Bureau of Investigation, had committed prosecutable offenses against the criminal laws of the United States. Such an investigation was immediately begun by the staff of the Criminal Division and regular reports on its status were made to the Attorney General.

On March 2, 1976, the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities acceded to the Department's request that the Criminal Division be allowed access to the documentary evidence in its possession

- 2 -

concerning the projects. In August 1976 the Criminal Division submitted to the Attorney General a report summarizing the evidence it had acquired, and analyzing the legal questions that potential prosecutions would present. The report concluded that it was highly unlikely that prosecutions would end in criminal convictions and recommended that no indictments be sought.

Because of the importance of this recommendation and its conclusion that a prosecution would so likely fail, the Attorney General and the Deputy Attorney General asked the Criminal Division to review its analysis and findings, and in addition asked experienced criminal lawyers in the Tax Division to undertake a review. As part of the review process, three experienced United States Attorneys, and two specially appointed consultants, Professors Herbert Wechsler and Philip B. Kurland, were asked to participate in an evaluation of the recommendations with the Attorney General, the Deputy Attorney General, the Solicitor General, and the Assistant Attorney General for the Criminal Division.^{1/}

^{1/} In the course of these deliberations, it became clear that no decision to prosecute could responsibly be made on one of the two mail opening projects -- the West Coast Project which is described on pages 20-21, infra -- within the five year statute of limitations set forth in 18 U.S.C. §3283. In any event, it was the unanimous view that, because the West Coast Project was of relatively brief duration, small in scale, and directed only to incoming mail, any potential prosecution inevitably would focus on the CIA's East Coast mail openings, described on pages 7-19. These openings ended in early 1973, and only the last year of the project is within the statute of limitations. This is enough, however, to allow a prosecution to be commenced with respect to these acts and the entire agreement, dating to 1953, to open mail.

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The Department has now completed its investigation into the mail opening projects and has examined in detail the elements of the crimes that may have been committed, the defenses that might be presented, and the proof that would be required to establish the commission of crimes and refute the expected defenses.

Although the Department is of the firm view that activities similar in scope and authorization to those conducted by the CIA between 1953 and 1973 would be unlawful if undertaken today, the Department has concluded that a prosecution of the potential defendants for these activities would be unlikely to succeed because of the unavailability of important evidence 2/ and because of the [state of the law] that prevailed during the course of the mail openings program.

It would be mistaken to suppose that it was always clearly perceived that the particular mail opening programs of the CIA were obviously illegal. The Department believes that this opinion is a serious misperception of our Nation's recent history, of the way the law has evolved and the factors to which it responded -- a substitution of what we now believe is and must be the case for what was. It was until recent years by no means clear that

2/ Important evidence would be missing because of the great length of time between the commencement of the mail openings and the holding of a potential trial. Many important participants in the process have died, and because some of the events occurred a generation ago, the memories of other witnesses

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the law and, accordingly, the Department's position, would evolve as they have. A substantial portion of the period in which the conduct in question occurred was marked by a high degree of public concern over the danger of foreign threats. The view both inside and, to some extent, outside the government was that, in response to exigencies of national security, the President's constitutional power to authorize collection of intelligence was of extremely broad scope. For a variety of reasons judicial decisions touching on these problems were rare and of ambiguous import. Applied to the present case, these circumstances lead to reasonable claims that persons should not be prosecuted when the governing rules of law have changed during and after the conduct that would give rise to the prosecution. They also would support defenses, such as good faith mistake or reliance on the approval of government officials with apparent authority to give approval. Whether these arguments would be acceptable legal defenses is not necessarily dispositive. As Judge Leventhal has reminded us: 3/

Our system is structured to provide intervention points that serve to mitigate the inequitable impact of general laws while avoiding the massive step of reformulating the law's requirements to meet the special facts of one harsh case. Prosecutors can choose not to prosecute, for they are expected to use their "good sense. . . conscience

3/ United States v. Barker, C.A.D.C., No. 74-1883, decided May 17, 1976 (dissenting opinion), quoting from United States v. Dotterweich, 320 U.S. 277, 285 (1943).

- 5 -

and circumspection" to ameliorate the hardship of rules of law. Juries can choose not to convict if they feel conviction is unjustified, even though they are not instructed that they possess such dispensing power.

These factors would make difficult a showing of personal guilt. The issue involved in these past programs, in the Department's view, relates less to personal guilt than to official governmental practices that extended over two decades. In a very real sense, this case involves a general failure of the government, including the Department of Justice itself, over the period of the mail opening programs, ever clearly to address and to resolve for its own internal regulation the constitutional and legal restrictions on the relevant aspects of the exercise of Presidential power. The actions of Presidents, their advisors in such affairs, and the Department itself might have been thought to support the notion that the governmental power, in scope and manner of exercise, was not subject to restrictions that, through a very recent evolution of the law and the Department's own thinking, are now considered essential. In such circumstances, prosecution takes on an air of hypocrisy and may appear to be the sacrifice of a scapegoat -- which increases yet again the likelihood of acquittal. And in this case, an acquittal would have its own costs -- it could create the impression that these activities are legal, or that juries are unwilling to apply legal principles rigorously in cases similar to this.

- 6 -

Where a prosecution, whether successful or not, raises questions of essential fairness, and if unsuccessful could defeat the establishment of rules for the future, the Department's primary concern must be the proper operation of the government for the present and in the future. The Department of Justice has concluded, therefore, that prosecution should be declined. At the same time, however, the need of eliminating legal ambiguities and of guiding future conduct in this field demands a precise public statement of the Department's position on the law -- namely, that any similar conduct undertaken today or in the future would be considered unlawful. Ordinarily public announcements of reasons for declining prosecution are not made, for they may invade the privacy of the potential defendants and charge them with misconduct while denying them an opportunity to respond in court. The circumstances of this case justify an exception to that rule. Publication of the Rockefeller Commission and Senate Select Committee reports, with their extensive descriptions of the mail opening programs, substantially diminishes any harm to the potential defendants' reputations that could be caused by public explanation of the Department's position. The harm is further diminished by the description of the circumstances and the considerations of fairness on which the Department's decision not to prosecute ultimately rests.

I. SUMMARY DESCRIPTION OF ORIGINS, CONDUCT AND
TERMINATION OF CIA MAIL OPENING ACTIVITIES
IN THE UNITED STATES.

Investigations conducted by the Rockefeller Commission, the Senate Select Committee, and the Department of Justice disclose that between 1953 and 1973 the CIA engaged in five separate projects involving the opening of mail in United States postal channels. The "East Coast Project" began in 1953 and ended early in 1973; the "West Coast Project" was carried out intermittently from 1969 to 1971. Three remaining projects were of brief duration and ended more than a decade ago. Prosecution for violations arising out of all but the East Coast Project is barred by the statute of limitations.

A. East Coast Mail Project

In 1952 the CIA, investigating the possibility of gaining positive and operational intelligence information from first-class mail to or from the Soviet Union, found that all such mail was sent through postal facilities in the New York City area. Postal inspectors were contacted and, with their cooperation, plans were made for CIA personnel to conduct surveillance of United States-Soviet mail.

In February 1953, when the program was implemented, CIA personnel from the Office of Security were permitted to examine and copy (by hand) information from envelope exteriors

under the close supervision of a postal inspector, but they were admonished that the mail could not be tampered with or delayed. From the very outset of this operation, however, the CIA planned to convert the project into a mail opening operation. The major obstacle to accomplishing this goal was the constant presence of a postal inspector. The CIA thought that if it could establish procedures to photograph the exterior of the mail, it could obtain relatively unsupervised access to the mail.

Such an expansion of the operation required contact by Director of Central Intelligence ("DCI") Allen Dulles with postal officials. An undated memorandum prepared by the CIA's Director of Security in late 1953 noted that the New York mail operation was at that time confined to the inspection of covers only. It recommended that the project be discussed as soon as possible with the President and that a secret White House directive be issued jointly to the Central Intelligence Agency and the Post Office Department requesting those organizations to make a "study" on the subject of the censorship of foreign mail. The memorandum noted that the CIA could then disclose its desires and requirements to the Post Office Department and take steps to implement the program on an expanded scale. This memorandum was not formally transmitted to Dulles but, on January 4, 1954, the Director of Security forwarded

a memorandum to Dulles which recommended that CIA seek expanded access to the mails from the Postmaster General for the purpose of photographing covers; the Director of Security also recommended that the "oral approval" of the President be obtained.

In May 1954 Director Dulles, accompanied by then Chief of Operations Richard Helms, briefed Postmaster General Arthur Summerfield about the CIA's desires for expanded access and means to photograph envelope exteriors. The Chief Postal Inspector agreed to permit such photographing. A contemporaneous CIA memorandum of that briefing makes no reference to any discussion of mail openings. The Chief Postal Inspector specifically recalled, in a 1975 interview, that DCI Dulles argued that the Soviets opened mail and, therefore, that the CIA's efforts were unfairly circumscribed by American postal practices. However, the Inspector, now deceased, recalled that he had told DCI Dulles that any opening of letters would, in his view, be a violation of postal law.

Following this briefing, the CIA obtained private rooms at two New York postal facilities. Although some information suggests that a very few selected openings may have occurred as early as July 1953, available evidence indicates that the selective opening and reading of letters with some regularity began in late 1954.

The Department has been unable conclusively to establish whether, as recommended in the January 4, 1954, memorandum, and as suggested by certain individuals in testimony before the Rockefeller Commission and Congress and in statements to Department representatives, the CIA obtained authorization from President Eisenhower to open and read mail. There is, however, evidence suggesting that President Eisenhower had knowledge of and had approved the CIA's East Coast operation.

Opinions regarding President Eisenhower's knowledge and approval were expressed by close associates of both President Eisenhower and DCI Dulles. Their judgments are based on experience with government operations, and their own knowledge of the individual characteristics and habits of Eisenhower and Dulles. For example, one high level official stated that no substantial CIA operation would have been undertaken without at least tacit White House approval. Another expressed the opinion that the CIA mail operation was the type of operation which would have been cleared with President Eisenhower by Allen Dulles. This same official recounted a Cabinet level discussion with President Eisenhower in which the reading of incoming Soviet mail was raised, but he was uncertain about the context in which the subject was discussed. Still another official in the Eisenhower Administration said it is "inconceivable" that Allen Dulles would

have embarked on any program as sensitive as the East Coast mail intercept without first informing the President. Former associates of Allen Dulles stated that Mr. Dulles was most conscientious about keeping President Eisenhower informed of the operations of the CIA.^{4/} A former close associate of Mr. Dulles indicated that in about 1960 he was officially advised by a Dulles assistant that Mr. Dulles had informed President Eisenhower of the CIA's mail intercept project.

The absence of any conclusive evidence of presidential authorization should be considered in light of the well-observed, but seldom discussed, practice described as "plausible deniability" or "presidential deniability." Knowledgeable witnesses have noted that there existed in high government circles a long-standing aversion to making written records of presidential authorizations of sensitive intelligence-related operations.^{5/} It was thought that the conduct of foreign

4/ Foreign intelligence matters were of great interest to President Eisenhower, and he frequently consulted with DCI Allen Dulles and his brother, Secretary of State John Foster Dulles, concerning such matters.

5/ An example of this practice is the handling of the U-2 matter. According to high level officials, President Eisenhower personally approved all U-2 overflights, including the one in which an American pilot was shot down over Soviet territory just before the 1960 Paris summit conference. One former Eisenhower aide had first-hand knowledge that President Eisenhower made his U-2 approvals orally, and that no written records of such authorizations were made.

affairs frequently required the practice of non-recording of such presidential authorizations. Covert actions were, by National Security Council definition, designed so that the United States Government could plausibly disclaim any responsibility for them. The concept of plausible or presidential deniability had been extended by interpretation, custom and usage to cover all sensitive intelligence activities. Moreover, the minutes of the President's Foreign Intelligence Advisory Board contain expressions of concern covering the relevant period from 1956 onward. For example, the minutes contain such phrases as "the President's shield," and "need to protect the President against public identification with . . . covert activities or intelligence activities," and "for security reasons, every effort would be made to leave no papers with the President."

In 1955 responsibility for the East Coast Project was given to the Counterintelligence (CI) Staff of the CIA. An outline of the funding, staffing and other logistical needs of the East Coast Project noted that foreign espionage agents relied upon the United States policy of respecting the sanctity of the mails and that these agents used the mails for espionage purposes to the detriment of the United States. It noted that, although the project did not contemplate censorship, discreet monitoring (opening) would be conducted and that under CI staff management "more letters will be opened."

In 1958 the FBI was advised of the existence and extent of the CIA's East Coast mail project, and the CIA offered to share the project's "take" with the FBI. FBI Director Hoover gave his approval, and the FBI provided the CIA with the names and categories of persons or organizations in which it had an espionage or counterespionage interest. Such lists were used as additional guides by the CIA in making selections from the United States-Soviet mail that passed through the CIA checkpoint.

On February 15, 1961, following the election of President Kennedy, DCI Allen Dulles, Deputy Director of Plans Richard Helms, and another CIA officer met with newly appointed Postmaster General J. Edward Day. According to Mr. Day's recollection, Dulles said he came to tell him of "something secret" regarding the CIA and the mails. Exactly what Day was told is not clear. A contemporaneous CIA memorandum of the 1961 meeting strongly suggests that Day was told by Dulles of mail openings being made by the CIA. On the other hand, in 1975 Day averred that, while his memory of the 1961 meeting might be faulty, he recalled that Dulles offered to tell him of a secret CIA mail operation but that he (Day) declined the invitation to be briefed. Day, however, remains uncertain. Three months later DCI Dulles approved continuation of the project on the basis of its value to the intelligence operations of the CIA.

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The Department's investigation has not definitively established whether Presidents Kennedy and Johnson were aware of the East Coast Project. President Eisenhower authorized Allen Dulles to brief President-elect Kennedy on all significant intelligence operations conducted by the CIA and other intelligence agencies. President-elect Kennedy met with Mr. Dulles on several occasions during and after the transition period to discuss such operations, but the Department has not been able to determine whether the East Coast Project was covered during the briefings.

In 1965, prompted by hearings held by Senator Edward V. Long concerning possible legislation to abolish mail covers by federal agencies, a high CIA official learned that President Johnson apparently had not been briefed on the East Coast Project and "gave instructions that steps should be taken to arrange to pass (information concerning the project) through McGeorge Bundy to the President after the (Long) Subcommittee has completed its investigation." Mr. Bundy does not recall being informed of the East Coast Project, and no documentary record that indicates such instructions were carried out has been found. Richard Helms testified that he believes he may have advised President Johnson of the East Coast project in the spring of 1967 at a meeting during which the President requested information concerning sensitive CIA operations. Again, no direct evidence corroborating or refuting Mr. Helms' statements has been located.

Interviews with former high level officials within the Kennedy and Johnson Administrations, however, disclose that Presidents Kennedy and Johnson were briefed on a regular basis by CIA officials about sensitive CIA operations. One former Cabinet official in both the Kennedy and Johnson Administrations stated that he was aware that mail openings were being conducted in the United States, although he did not know details of particular projects or their scope. The Cabinet officer stated that he believed Presidents Kennedy and Johnson were generally aware that the CIA was engaging in operations similar to the East Coast Project.

Interviews of individuals who served as members of the President's Foreign Intelligence Advisory Board (PFIAB) during the Kennedy and Johnson Administrations indicate that these individuals were aware of domestic mail openings by the CIA and FBI. PFIAB had the responsibility to review and assess the activities of the CIA and other agencies with foreign intelligence responsibilities and to advise the President on such matters. One PFIAB member, who served until 1968, stated that the PFIAB gave detailed briefings to the President; moreover, he stated his belief that the President would "have to be in a fog" to be unaware of the fact that techniques such as mail openings were being used. Again, however, the practice of "plausible deniability" was frequently raised by

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persons knowledgeable of government intelligence practices as a possible explanation for the absence of any written records of presidential knowledge or authorization for the East Coast Project.

With the inception of Operation CHAOS, designed to determine the extent of hostile foreign influence on domestic unrest, the East Coast Project assumed a new intelligence-related purpose. In addition to Operations CHAOS, the project sought to develop positive foreign intelligence, such as information on Soviet crop and living conditions and population movements. Moreover, operational support intelligence was sought such as information on the postal censorship and secret writing techniques of the USSR, and there was a counter-intelligence purpose to assist the United States in meeting and neutralizing Soviet intelligence activities.

In July 1969 the CIA Inspector General's staff examined the East Coast Project and recommended that, although President Eisenhower apparently had authorized the project, if the CIA were to continue to administer the project, senior officials within the Nixon Administration should be briefed.

In 1969 William Cotter, a former CIA employee aware of the East Coast Project, was appointed Chief Postal

Inspector. Concerned that other top level postal officials were unaware of the project, in 1970 Cotter informed the CIA that either the Postmaster General would have to be apprised of the East Coast Project or it would have to be discontinued. Cotter pressed his request in January 1971. This caused a reevaluation of the merits of the East Coast Project. A CIA memorandum dated March 29, 1971, strongly urged continuation of the project, describing it as "an irreplaceable tool for the exercise of the Agency's counterintelligence responsibility." The memorandum noted that the counterintelligence information developed by the project was also of assistance to "the White House, the Attorney General and the FBI."

The CIA's senior officials decided to continue the project. In June 1971, to meet Cotter's concerns, Director of Central Intelligence Helms separately briefed both Attorney General John Mitchell and Postmaster General Winton Blount. There is dispute as to what the briefings encompassed. A contemporaneous CIA memorandum indicates that Mitchell and Blount were informed of the East Coast Project and agreed to its continuation; Helms testified before the Rockefeller Commission that he informed them fully

about the nature and scope of the mail opening project. Mitchell and Blount, though they acknowledge that there may have been a general discussion of mail covers, state that they were not informed about the opening of mail.

Former President Nixon has stated that he was aware of the CIA's monitoring of mail between the United States and the Soviet Union and the Peoples' Republic of China, but he disclaims any knowledge of mail openings, and the Department has uncovered no direct evidence which suggests that former President Nixon was ever specifically informed of the mail opening projects. It appears, however, that during the Nixon Administration the White House was receiving intelligence reports that enabled White House officials to determine that mail was being opened. John D. Ehrlichman, a White House official in the Nixon Administration, testified before the Senate Select Committee that, from his reading of intelligence reports, he was able to determine that mail was being intercepted, presumably by the CIA.

With the resignations of Postmaster General Blount in 1971 and Attorney General Mitchell in 1972, Chief Inspector Cotter again believed himself to be the only

senior government official outside the CIA and FBI with knowledge of the East Coast Project. He again informed CIA officials that, unless higher level approval for the project was obtained by February 15, 1973, he would withdraw the Postal Service's cooperation. James Schlesinger, who had succeeded Helms as DCI, decided that the foreign intelligence and counterintelligence information derived from the project did not outweigh the risk of embarrassment and potential public repercussions presented by its continuation. On February 15, 1973, the East Coast Project was suspended and, in effect, terminated.

Whether the failure of the Department's investigation to uncover any direct evidence, written or oral, of presidential knowledge or authorization was caused by the nonexistence of such knowledge or authorization, by confusion of mail openings with "mail covers," which were generally viewed as legitimate, or by the passage of time and the "presidential deniability" concept discussed above, cannot be determined. However, on the existing record, the government could not prove in a criminal prosecution beyond a reasonable doubt that the East Coast Project was conducted without presidential approval or without presidential knowledge and acquiescence.

B. West Coast Project

The West Coast Project was proposed in 1969 by CIA officials within the CIA's Plans Directorate for the purpose of obtaining foreign intelligence concerning the Peoples' Republic of China. The CIA was particularly interested in censorship techniques used by the Peoples' Republic of China, and the project was intended to evaluate such techniques through a survey of mail entering the United States from the Peoples' Republic of China. Initially, it was contemplated that the project would entail only the inspection of envelope exteriors. Approval of the project by postal officials was secured for a survey of envelope exteriors.

The West Coast Project, conducted in or near San Francisco, involved four separate surveys of mail between 1969 and 1971. The first survey took place in September, 1969 and lasted five days. Approximately 1,600 envelopes of incoming mail were screened during this period. No mail was opened in this initial survey, which apparently was undertaken without approval by top level CIA officials. The lower level officials responsible at that time for the project deemed this initial survey successful and concluded

that a broader scale survey of mail should be undertaken in order to evaluate Chinese intelligence techniques. During 1970 and 1971, three additional surveys were conducted by CIA officials in San Francisco, each lasting two or three weeks. In each of these surveys, only incoming mail from the Peoples' Republic of China was opened, apparently without the knowledge of the postal officials who cooperated by providing CIA officers with access to the mail. Approximately 550 pieces of mail were opened by the CIA during the course of the project. After the project's 1971 phase, no further West Coast operations were undertaken.

II. GROUNDS FOR PROSECUTION, POSSIBLE DEFENSES, AND EQUITABLE CONSIDERATIONS

A. Grounds for prosecution.

The Department of Justice has considered two statutory bases for prosecution of persons who participated in the East Coast Project. The first; 18 U.S.C. §1702, prohibits the unauthorized opening or obstruction of mail in United States postal channels; the second, 18 U.S.C. §241, proscribes conspiracies to deprive United States citizens of rights guaranteed by the Constitution. Under the general conspiracy statute, 18 U.S.C. §371, liability would extend to persons who agreed to take part in violations of sections 241 or 1702, whether by opening the mails, by approving the openings, or by acting in concert with others who opened the mails.

A prosecution under section 241 requires proof of a violation of rights conferred on American citizens by the Constitution or laws of the United States; with regard to the mail openings, the prosecution would be premised upon a violation of the Fourth Amendment's prohibition against unreasonable searches and seizures. A prosecution cannot be maintained under section 241, however, unless it can be established that the defendants acted, or agreed to act, with the purpose of invading rights or interests protected by

the Constitution or by federal laws and that, at the time the defendants acted, protection of the right or interest violated had been "made definite by decision or other rule of law."^{6/} Weaknesses in the evidence and the difficulty of establishing the absence of presidential authorization suggest that the Department would not be able to meet the burden of establishing, beyond a reasonable doubt, that the defendants acted with the "specific intent" required by section 241 as interpreted by the Supreme Court. Moreover, it is doubtful that, at the time the defendants acted, the Fourth Amendment forbade their actions with sufficient clarity to be "definite;" between 1953 and 1973 there was substantial evolution of Fourth Amendment law, as discussed later in this Report.

In a prosecution under section 1702 the Department would not be confronted with similar difficulties. All that is required to establish a prima facie violation of section 1702 is a showing that (a) the defendant opened mail in postal channels with "design to obstruct the correspondence, or to pry into the business or secrets of another" and (b) the defendant lacked lawful authority to do so.

6/ See Screws v. United States, 325 U.S. 91 (1945). See also United States v. Price, 383 U.S. 787, 806 n. 20 (1966); Anderson v. United States, 417 U.S. 211 (1974).

Whether the openings of mail in the present case violated section 1702 depends upon two related points:

First, was authorization, from a person empowered to give such authorization, obtained for the East Coast Project?^{7/}

Second, if some authorization was obtained, was it effective? Resolution of the latter question requires a consideration of whether the Fourth Amendment to the Constitution permits officials of the Executive Branch to authorize the opening and reading of international mail and, if so, under what conditions and by what means. We turn to a consideration of those problems.

B. The requirement of lawful authorization.

Some courts have treated section 1702 as a specific intent statute, which would make prosecution overwhelmingly difficult. The Department of Justice believes, however, that a better view of the law is taken by the courts, which have treated it as a "general intent" statute, providing that persons shall not open envelopes moving through the mails. Its prohibition does not, however, extend to openings that have been lawfully authorized. Thus, other statutes (see, e.g., 19 U.S.C. §482) authorize the opening of envelopes under specified circumstances, and acting under its general powers the Postal Service

^{7/} Since no statute authorizes the CIA to intercept or open mail in United States postal channels, legal authority for the East Coast Project could be derived only from powers granted to the President by Article II of the Constitution and delegated by him to the CIA or others.

itself opens envelopes when necessary to ascertain the address of the intended recipient. Indeed, unless there were an "authorized opening" exception, a law enforcement official who opened mail pursuant to a judicial warrant would violate the statute.^{8/} See United States v. Van Leeuwen, 397 U.S. 249 (1970). The Department of Justice consequently believes that the actions of the CIA in opening mail also would not violate section 1702, if those actions were properly authorized.^{9/}

^{8/} An 1882 decision interpreting a statutory predecessor to section 1702 stated that "one is punishable who wrongfully, without any authority of law, or pretence of authority," interferes with the mail. United States v. McCready, 11 Fed. 225, 236 (W.D. Tenn. 1882).

^{9/} Neither section 1702 nor any other statute purports to take from the President, and the Executive Branch in general, any preexisting power to open and examine mail when necessary to the discharge of the President's constitutional responsibility for foreign affairs. Cf. United States v. Butenko, 494 F.2d. 593 (3rd Circ.) (en banc), certiorari denied, 419 U.S. 881 (1974), which holds that an analogous statute, although containing a broadly stated prohibition, does not affect presidential power to authorize surveillance when the Constitution otherwise permits it.

One other statute, 39 U.S.C. §3623(d), might be considered to do so. That statute forbids the opening of domestic first-class mail without a warrant. Nothing in the legislative history of section 3623(d) indicates that it was designed to affect the power of the President concerning foreign affairs. See, e.g., H.R. Conf. Rep. No. 91-1363, 91st Cong., 2d Sess. 88 (1970). Although section 3623(d) originated in the Espionage Act of 1917, 40 Stat. 230, it then contained only a statement that the Act did not affirmatively authorize the opening of mail. Moreover, it applies only to letters of "domestic origin," and so would not affect the opening of mail entering the United States from abroad. Finally, (continued on following page)

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9/ Footnote continued from previous page.
section 3623(d) does not refer to section 1702 and does not provide criminal penalties for opening mail without a warrant. Nothing in the legislative history of the enactment of section 3623(d) indicates that Congress believed that it was altering the elements of 18 U.S.C. §1702.

It would have been extraordinary for the Congress without discussion to have enacted a restriction upon the President's foreign intelligence surveillance power so obliquely when, in 1968, legislating with respect to the much greater invasion of privacy constituted by wiretapping, it carefully disclaimed any intent to affect this area -- partly in response to the concern that it might have no power to do so. See 18 U.S.C. §2511(3), which is discussed at length in the Keith case. The Department has not heretofore taken that view of the statute, and to do so for the first time in connection with the present prosecution would -- in addition to reaching only post-1970 activities -- raise the difficulties concerning fairness, the defense of mistake of law, and jury reaction discussed below in connection with newly imposed requirements regarding the character of presidential authorization.

The Department does not wish, however, to make a final determination concerning the future interpretation it will accord section 3623(d) in the distorting context of the present proceeding, where any position other than that set forth above would have the flavor of retroactive legislation. If in the future any mail opening, based on express, properly limited Presidential authority, is contemplated, we would regard as a necessary preliminary step to assure its lawfulness the issuance of an advisory opinion by the Attorney General concerning the effect of section 3623(d) upon section 1702.

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We think it clear that the prosecution could not establish beyond a reasonable doubt, as it would be required to do, that the East Coast Project was not authorized by the President, or by someone entitled to act for the President. The effect this would have on the legality of the mail opening program has changed considerably over the last 20 years; the authorization (which the court would be required to assume if the prosecution could not prove lack of authorization beyond a reasonable doubt) may have been sufficient at the outset to satisfy the requirements of the Fourth Amendment, but the understanding of the requirements of that Amendment has not remained constant.

The CIA mail opening program was initiated and took shape during the 1950s. Later operations were a continuation of this program with changes in emphasis. During the 1950s, and well into the 1970s, the law concerning clandestine surveillance was quite different, and the requirement of prior judicial authorization was different. Indeed, until 1967 respected scholars argued that the judiciary was the wrong branch of government to make authorization decisions concerning any clandestine surveillance; until 1972 courts held that prior judicial scrutiny was unnecessary when the surveillance involved national security; and at the present

time the case law indicates that prior judicial scrutiny is not necessary when surveillance of foreign powers or their agents is involved.

The Supreme Court indicated long ago ^{10/} that sealed domestic mail may not be opened in the absence of a search warrant. This ruling was based upon the expectation of privacy enjoyed with respect to the contents of first-class mail; that privacy was guaranteed by statute, and courts held that other classes of mail could be opened without judicial authorization. Those who send or receive mail crossing the border of the United States do not enjoy the same expectation of privacy as those sending or receiving domestic first-class mail. Customs Service officers are permitted by law to open all envelopes for necessary inspections. ^{11/} There may also be other reasons why international and domestic mail should be treated differently.

^{10/} Ex parte Jackson, 96 U.S. 727 (1877).

^{11/} 19 U.S.C. §482.

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The expectation of privacy in the contents of international mail therefore cannot easily be equated to the expectation of privacy in domestic mail.

No cases have dealt with the surreptitious opening of international mail to gather foreign intelligence or counterintelligence information, but there is a close analogy in the interception of wire communications. In neither case is property taken; in neither case is a person delayed or physically inconvenienced. But in both cases private communications are intercepted, and the constitutional question becomes whether this intrusion must be authorized in advance in a specified way.

The Supreme Court's first constitutional decision concerning wire interceptions was Olmstead v. United States, 277 U.S. 438, which was handed down in 1928. Olmstead held that telephone conversations could be overheard without prior judicial approval. The Court set out two major rationales for its holding; first, that the interception of wire communications does not "seize" anything within the meaning of the Fourth Amendment because there is no physical trespass and it does not prevent the parties from conversing; second, that the Fourth Amendment does not reach beyond the home or office to the whole world into which communications may be sent. Under the standards of Olmstead, which was the law when the CIA

mail opening programs began, there was apparently no constitutional need for judicial approval of a program of covert openings of international mail, so long as the mail was resealed and sent on to its destination without censorship.

The law established by Olmstead did not begin to change until 1961, when the Supreme Court decided in Silverman v. United States 365 U.S. 505, that the Fourth Amendment applied to a listening device or "bug" placed by physical trespass in the wall of an office, even though the device did not prevent conversations from taking place. Silverman, however, left the remainder of the Olmstead analysis untouched.

During these years there also were serious questions whether the judiciary was empowered under Article III of the Constitution to issue surveillance orders. Respected scholars^{12/} and at least one Justice of the Supreme Court^{13/} argued that surveillance orders issued ex parte were not part of a "case or controversy" if they were not part of a criminal prosecution, and so judges lacked power to issue them. They argued, as well, that surveillance orders could

12/ See, e.g., Telford Taylor, Two Studies in Constitutional Interpretation: Search, Seizure, and Surveillance 77-93 (1969).

13/ Osborn v. United States, 385 U.S. 323, 353 (1966) (Douglas, J., concurring).

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not be classified as "warrants" under the Fourth Amendment because they were not designed to seize identifiable things and were not "returned" to the issuing judge in the historical fashion. Other objections, too, were raised. Resort to the judiciary, it was said, would diffuse responsibility and accountability for surveillance; responsible executive officials should authorize surveillance when necessary, and the Constitution would not forbid this practice.^{14/}

In 1967, in Katz v. United States, 389 U.S. 347, the Supreme Court both overruled Olmstead and indicated that judges were empowered to issue surveillance orders in criminal cases. Katz held that the Fourth Amendment protects people, not places, and that law enforcement officers ordinarily must obtain advance judicial approval before intercepting communications in which there is a legitimate expectation of privacy.

Katz, however, did not resolve the question of whether a judicial warrant was available in non-criminal cases or whether it was necessary when national security was involved. The Supreme Court did not speak to the latter question until June 19, 1972, when it decided United States v. United States District Court (Keith), 407 U.S. 297. The United States argued in that

^{14/} See, e.g., Taylor, supra, at 90.

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case that the requirement of prior judicial approval should not apply to surveillance carried out to gather information about domestic security and foreign intelligence -- an argument which would, of course, support the propriety of the CIA mail opening programs as well as of wire interceptions for that purpose. The Supreme Court rejected part of the argument and held that a warrant is required for electronic surveillance in domestic security investigations. The Court made it clear, however, that it was setting aside a lengthy history of contrary practice,^{15/} and that it was reserving for decision in the future all questions concerning the procedures required to be used to gather foreign intelligence.^{16/}

The East Coast Project ended eight months after Keith was decided. Keith affected the propriety of warrantless foreign intelligence surveillance, but it did not decide it. Those courts which have decided the issue have upheld such warrantless surveillance, and the Department of Justice has consistently taken the position in the courts, before congressional committees, and in public statements that the President or the Attorney General may authorize limited electronic surveillance of foreign powers or their agents for foreign intelligence

^{15/} 407 U.S. at 299, 310-311.

^{16/} 407 U.S. at 308-309, 321-322.

purposes.^{17/} The CIA mail opening program was not authorized with the care and clarity that current practices and, we believe, the Constitution now require. But these principles have evolved so rapidly during the last two decades that they would have sounded strange to those who initiated the program during the 1950s and continued it during the 1960s.

A retroactive application of newly enunciated Fourth Amendment principles to persons whose conduct took place before the principles were established could, of course, not deter like conduct; and it would be unfair to punish federal employees for doing things which, as the law then appeared, were not illegal. The Supreme Court has held that changes in Fourth Amendment law should not apply retroactively.

United States v. Peltier, 422 U.S. 531 (1975). That principle surely applies to criminal prosecutions against those who may have transgressed the Fourth Amendment no less than it does to the application of the exclusionary rule, which was at issue in Peltier.^{18/}

^{17/} Compare United States v. Brown, 484 F.2d 418 (5th Cir. 1973), certiorari denied, 415 U.S. 960 (1974); and United States v. Butenko, 494 F.2d 593 (3d Cir.) (en banc), certiorari denied, 419 U.S. 881 (1974); with Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975) (en banc), certiorari denied, 425 U.S. 944 (1976).

^{18/} See also Wood v. Strickland, 420 U.S. 308, 321 (1975), which holds that certain executive officials are liable in damages for a violation of constitutional rights only if they act in "ignorance or disregard of settled, indisputable law"

The role of authorization and its legality also is affected by changes in the law of border searches. It has long been accepted that things crossing the border are governed by special rules allowing search.^{19/} These constitutional rules do not allow the government to subject a person to legal disabilities on account of his lawful communications,^{20/} but they allow federal officers to open the mail without warrants to look for contraband and dutiable items, including pornography.^{21/} These rules may affect the expectation of privacy surrounding international correspondence. Moreover, the international exchange of ideas, especially with citizens of potentially unfriendly powers, may be on a different footing from the domestic exchange of ideas.^{22/}

19/ See Cotzhausen v. Nazro, 107 U.S. 215 (1882); California Bankers Ass'n v. Shultz, 416 U.S. 21, 62-63 (1974).

20/ Lamont v. Postmaster General, 381 U.S. 301 (1965).

21/ United States v. Thirty-seven Photographs, 402 U.S. 363 (1971); United States v. 12 200 ft. Reels of Super 8 mm. Film, 413 U.S. 123 (1973).

22/ Kleindienst v. Mandel, 408 U.S. 753 (1972).

Until 1973 it was widely thought that the border search rules allowed the inland search of persons and vehicles near the border for contraband and dutiable items.^{23/} The large majority of courts uphold the legality of opening envelopes at the border. Six courts of appeals have held that Customs officers may open envelopes without probable cause or search warrants to search for contraband, although one court of appeals has held to the contrary. The Supreme Court may resolve the dispute in the coming months.^{24/} The scope of the "border search" exception to the warrant clause of the Fourth Amendment would certainly bear upon the legality of any authorization to inspect international mail.

The discussion so far has traced changes in the law, during and after the time of the mail openings by the CIA, that would affect the lawfulness of a properly authorized surveillance. The law also has evolved in recent years concerning the form an authorization must take and the restrictions that must be observed in exercising any authority delegated to approve the activities. Questions regarding the necessity for express delegations by the President of his constitutional authority and for periodic reexamination of

^{23/} Almeida-Sanchez v. United States, 413 U.S. 266. The extent to which Almeida-Sanchez altered existing law is discussed in United States v. Peltier, *supra*, 422 U.S. at 539-542.

^{24/} United States v. Ramsey, certiorari granted October 4, 1976, No. 76-167.

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the activities in light of the need for the information and the intrusiveness of the techniques employed have only recently been addressed. These questions arise, in this case, because the presidential authorization for the East Coast Project -- if there was such authorization -- may have been presumptive rather than express; that is, it may have been in accord with the well-established principle applied in other areas of the law that agency heads are deemed to have been delegated those inherent presidential powers necessary to meet the responsibilities of the agency. Moreover, the approval for the openings was not limited in time, and responsible officials apparently did not reexamine the program on a regular basis to determine whether it should be continued.

Although the President may, consistent with the Constitution, authorize certain forms of surveillance to gather foreign intelligence information without seeking prior approval from the Judicial Branch, the Department believes that the evolving law in this area requires such authorization to be express. The executive official to whom the power to approve such surveillance has been delegated must take steps to assure himself that the surveillance is reasonable under Fourth Amendment standards.

He must consider the nature of the surveillance and the need for the information sought in determining whether to approve the activity, and then he must periodically reexamine the activity to ensure that it continues to meet constitutional standards. In urging the courts to accept executive authorizations of surveillance, the Department has argued that in each instance the personal approval of the President or his delegate, such as the Attorney General, would be employed to ensure the degree of consideration and control necessary under the Fourth Amendment.^{25/} Mr. Justice White, concurring in Katz, indicated that he would accept such executive approval of surveillance, but only if it was explicitly considered by responsible officials and properly delimited.^{26/}

It was only recently, in United States v. Ehrlichman, that a court of appeals concluded that a warrantless foreign intelligence search may be authorized only by the President or Attorney General personally, and that the authorization must

^{25/} See, e.g. the Brief for the United States in the Keith case.

^{26/} 389 U.S. at 364. See also the opinions in United States v. Brown, supra, and United States v. Butenko, supra.

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meet standards of consideration and limitation similar to those the Judicial Branch would impose on itself. 27/

The law we have described is of recent vintage. As was pointed out earlier, it was far from clear until 1967 that the judiciary would become involved in issuing warrants for surveillance even in criminal cases. Not until after Katz did courts begin to consider and delineate the requirements of specificity, personal responsibility, and limited duration that today limit the exercise of Executive Branch powers. It seems fair to conclude that, at the time the East Coast Project began, it was assumed that the President could, without issuing explicit delegations of power, allow others to speak for him in this field. So far as the CIA was concerned, the words of anyone who appeared to be authorized to speak for the President had the same legal effect as the President's own words.

27/ No. 74-1882, D.C. Cir., decided May 17, 1976, slip op. 31. Ehrlichman involved an inexplicit mandate which gave a general instruction to accomplish a particular end but did not discuss the means or techniques to be used to reach that end. Unlike the Ehrlichman case, there was an aura of presidential authority permeating the mail opening program for the two decades in which the technique was used. In addition, the program was not carried out, as the physical search was in Ehrlichman, by "an amorphous, ad hoc unit with no tradition of public service and no clear lines of responsibility," slip op. at 30, but by the unit of government established by Congress for the conduct of foreign intelligence operations.

Although President Eisenhower passed upon many foreign intelligence projects himself, he allowed Allen Dulles to speak for him on others, and CIA personnel may reasonably have assumed that Dulles did so with regard to the East Coast Project. Presidents Kennedy and Johnson often spoke through their subordinates -- or at least appeared to do so in order to maintain "plausible deniability." Any CIA personnel who discussed the matter with Attorney General Mitchell might reasonably have assumed that President Nixon acted in this respect through the Attorney General. Until various courts rendered several decisions within the past year, there was little or no indication from the judiciary that Presidents (or their surrogates) were required to act through explicit, time-limited orders; 28/ the entire concept of "plausible deniability" taught the opposite.

28/ Indeed, even as late as 1976 the courts seemed to accept an implied authority in the Attorney General without a written delegation of authority from the President. Ehrlichman, supra.

C. The Defense of Mistake.

Suppose, however, that it were concluded that present Fourth Amendment standards equitably could be applied to the East Coast Project, and that under those standards the authorizations -- if any there were -- would be insufficient to justify the lengthy and deeply intrusive program that was actually carried out. The trial court, and the jury, then would be required to determine whether the defendants made a mistake, either of fact or of law, sufficient to make them not culpable for violation of 18 U.S.C. §1702.

Mistake of fact generally is recognized as a defense in criminal cases; mistake of law is not. The present case would present both kinds of defenses -- mistake of fact to the extent the defendants reasonably believed there was presidential authorization for the East Coast Project, if in fact there was none; and mistake of law to the extent the defendants reasonably believed that the authorization was legally sufficient, if in law it was not.

The mistake of fact defense might not have to be raised by the defendants, since under the circumstances of this case the prosecution would have difficulty establishing that no authorization in fact existed. Because of the age of the evidence, the deaths of important participants in the events and the striving for "plausible deniability" that led to an absence of written records, the prosecution would be unable to prove

beyond a reasonable doubt that there was no presidential authorization for the East Coast Project. It would therefore, for practical purposes, have to concede that the mail openings were authorized and to argue that the authorization was ineffective. This would make it unnecessary for the defendants to raise a mistake of fact defense; the prosecution simply could not prove beyond a reasonable doubt that there was no authorization.

This would then lead to the assertion of a mistake of law defense. Mistake of law generally is recognized as a defense in criminal prosecutions only when a law or an authoritative legal decision or interpretation misled the defendant reasonably to believe that his conduct was lawful.^{29/} Criminal convictions in such circumstances would impose criminal sanctions for conduct which the defendant could not reasonably have known was unlawful.^{30/} In any potential mail opening prosecution, however, the normal foundation for the defense would not be present. No statute or judicial decision ever affirmatively established or announced that the mail opening projects, or conduct closely analogous to them, were lawful, and Attorney General Mitchell's possible approval of the projects lacked any indicia of a formal considered opinion

^{29/} See Model Penal Code §2.04(3)(b) (P.O.D. 1962).

^{30/} Cf. Bouie v. City of Columbia, 378 U.S. 347 (1964); Brief for the United States in Marks v. United States, No. 75-708, argued in the Supreme Court, November 1 and 2, 1976.

of law that the defense normally would require.

Notwithstanding this, the Department believes that the circumstances of the case could very well induce the trial court to instruct the jury on a mistake of law defense broader than that generally recognized, perhaps on the ground that a reasonable belief in lawful authority would negate the intent that section 1702 requires.^{31/} Indeed, in the recent decision of the District of Columbia Circuit Court in the Barker and Martinez case, the prevailing opinions of two judges concluded that expansive variants of the defense properly were available to defendants who, as private citizens, had assisted a White House official in what purported to be a national security search. Judge Wilkey concluded that the defense properly would

^{31/} Certain staff documents prepared in the CIA at several points in the East Coast Project's operation expressed the view that, under generally applicable domestic statutes, mail opening was unlawful. These documents, however, were not prepared by attorneys; they were not, in any sense, considered legal judgments; they did not conclude that, because of unlawfulness, the project should be terminated. To the contrary, their point appears to have been that the apparent unlawfulness would seriously embarrass the Agency if the program were exposed, perhaps especially because the true purpose and authorization of the project could not be exposed in justification. The Department accordingly does not believe it likely that such documents can be taken as indicating that the defendants subjectively were aware that the project was legally unjustified, or refute their probable defense that they believed it proper in the exercise of presidential power, supervening generally applicable law, to protect the national security.

apply if the defendants could show facts justifying their reasonable reliance on the White House official's apparent authority and a legal theory justifying their belief that the apparent authority was lawful. Judge Merhige concluded that a defense would be available if the defendants reasonably relied on an apparent interpretation of lawful authority by the White House official.

Even if the trial court did not choose to give an expansive mistake of law instruction, the Department believes that considerations of fairness would lead the judge to allow the introduction of evidence bearing on the defendants' motives and the circumstances in which they acted -- evidence which would, in the Department's view, critically influence the jury's judgment.

D. Problems of Proof.

Even if the prosecution could overcome the argument that the East Coast Project was adequately authorized, and even if it could successfully meet the defense of mistake, it still would not follow that the prosecution would be successful. The prosecution must prove its entire case beyond a reasonable doubt. Once a defense going to any of the elements of the offense has been raised, the prosecution must respond by negating that defense beyond a reasonable doubt.^{32/}

^{32/} See Mullaney v. Wilbur, 421 U.S. 684 (1975).

Problems of proof are difficult whenever the prosecution seeks to prove a crime that took place long ago. Statutes of limitations -- which for most federal crimes are five years -- are designed to alleviate these problems by creating a policy of repose for offenses not prosecuted within a few years of their commission.^{33/} Although the statute of limitations applicable to 18 U.S.C. §§ 1702 and 371 would allow a conspiracy prosecution for the entire East Coast Project so long as any overt act of the conspiracy (such as the opening of any envelope) were committed within five years of the date of the filing of the indictment, the technical permissibility of a prosecution could not overcome the enormous problems of proof entailed in establishing, beyond a reasonable doubt, criminal culpability for events that took place as long ago as 1953.

The clearest illustration of the difficulty in mounting a successful prosecution is the deaths of persons who were major participants in the events. Presidents Eisenhower, Kennedy and Johnson are dead; they cannot disclose what they knew of the East Coast Project or what they may have authorized. Allen Dulles, J. Edgar Hoover, Postmasters General, several directors of the operating divisions of the CIA -- all of them persons who may have given, sought, or obtained authorization, or controlled the scope or duration of the mail openings -- are dead.

^{33/} See generally the Brief for the United States in United States v. Lovasco, certiorari granted October 12, 1976, No. 75-187.

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If documentary evidence reliably establishing authorization or lack of authorization existed, or if documentary evidence establishing personal responsibility for the scope or duration of the East Coast Project could be found, it might be possible to prosecute successfully despite the deaths of important persons. But the concept of "plausible deniability" led the principals to act without making a "paper trail" that could be used to reconstruct their acts. The absence of documentary evidence was intended to frustrate enemies or potential enemies and to protect Presidents; in practice, at least in this case, it also has the effect of frustrating the Department's ability to prove critical facts beyond a reasonable doubt in court. Whatever use this practice may have had, the understanding of the present state of the law articulated here by the Department of Justice requires that it be eliminated for reasons discussed in part III below.

The gaps and ambiguities in the evidence available in 1977 also would make it difficult to overcome a defense of mistaken reliance on what appeared to be proper authorization. In 1953, when the East Coast Project was begun, and for at least a substantial portion of the period of its operation, there was an acute consciousness on the part of the public and the government alike that serious foreign threats -- of both overt aggression

and covert subversion -- required extraordinary vigilance. There was widespread, if unjustified, belief that opposition to government policies, occasionally expressed violently, was generated, encouraged or supported by potentially hostile foreign powers. These concerns unquestionably affected perceptions of the government and of presidential power to respond by using covert activities. These attitudes were reflected in the men who authorized and conducted the mail openings program. The reasonableness of their attitudes would influence, in substantial part, the reasonableness of their beliefs that they were entitled to act as they did. A trial of this case therefore would open a searching inquiry into the perceptions of a generation of Americans; it would be, as Professor Wechsler put it during the course of his consultation with the Department, to "indict an era" and would raise fundamental jurisprudential questions concerning the application and use of the criminal law.

The defendants in any mail openings prosecution would be able to present circumstantial evidence to indicate that Director Allen Dulles secured President Eisenhower's approval for the East Coast program; at least, the potential defendants reasonably could have believed and apparently did believe, that he had. The potential defendants, in any event, continued a program already begun -- a program that, by the time Richard Helms became Director of Central Intelligence, had acquired a

bureaucratic momentum of its own. The Agency's highest officials could have had every reason to suppose that, within the government itself, the program was thought fully consistent with the government's purposes, responsibilities, and powers. Potential defendants could reasonably have believed that Presidents succeeding President Eisenhower, and other high officials of the government's intelligence establishment during this later period, knew at least in a general way of the fact that mail openings were taking place and, in a general way, acquiesced in the practice. Furthermore, certain senior officials of both the Kennedy and Johnson Administrations have stated to the Department that, although they knew neither their nature nor their scope, they personally were aware of the existence of mail openings and were convinced that the Presidents under whom they served must have known as well. In light of such evidence, the Department almost certainly would encounter the gravest difficulties in proving guilt beyond a reasonable doubt.

The weaknesses of the evidence, combined with the changes in the law during the course of the East Coast Project, make it unlikely that a prosecution could succeed. An unsuccessful prosecution in a case of this nature would be most undesirable.

It would not establish standards to guide future conduct; to the contrary, an acquittal might be perceived, rightly or wrongly, as an indication that programs such as the East Coast Project are not now illegal -- an indication that the Department of Justice believes would be most unfortunate. Moreover, either the trial judge or an appellate court, sensing the equities of the case and the possibility that the defendants may have labored under an erroneous, albeit reasonable, belief that they were entitled to act as they did, might expand the availability of a "mistake of law" defense more than the Department believes is warranted. A prosecution in this case would present the courts with the sort of hard facts that lead to bad law.

Even to institute a prosecution and to win it might be unfair. If the potential defendants in fact had a reasonable belief that they were acting pursuant to lawful presidential authorization, a prosecution so many years later could appear to be a vindictive kind of second-guessing. All the worse to use the criminal sanction in hindsight against individuals when what we now see as wrong was not so much the malign conduct of individuals as a disturbing and dangerous policy of government. Bringing a criminal prosecution, especially when it would in all likelihood fail, is not the only nor even the best way to establish rules of conduct. The enunciation

of a clear interpretation of the Constitution and the criminal law that stands from this time forward as a barrier against such activity, whether by rogue individual officials or by the creation of an illegal policy, avoids the high risk of failure at trial but assures that the criminal law can justly be brought to bear on any further conduct of this sort.

III. THE DEPARTMENT BELIEVES THAT CONDUCT SIMILAR TO THE EAST COAST PROJECT TODAY WOULD BE CLEARLY ILLEGAL

This report has dealt so far with the problems in bringing and winning a prosecution for the CIA's mail interception program. The attention to the difficulties in the case should not obscure the most important of the Department's conclusions -- that any program similar to the East Coast Project, if carried out today or in the future, would violate the law. The Department therefore would not hesitate to prosecute any persons, whatever their office, who may become involved in such a program.

The East Coast Project arguably was authorized by Presidents and their delegates during a time when the Fourth Amendment was understood to be less rigorous in its requirements. Such a program conducted today could not meet the requirement of authorization.

With respect to the present situation, Executive Order 11905 withdrew any prior authorization for CIA mail opening programs. That order, issued February 18, 1976, prohibits the national security agencies covered by the order from "[o]pening of mail or examination of envelopes of mail in the United States postal channels except in accordance with applicable statutes and regulations." No statute or regulation authorizes the CIA to open or read mail.

More important, however, the Department of Justice believes that the President lacks the authority to authorize a program comparable to the East Coast Project whether or not Executive Order 11905 continues in effect. This is so for a number of reasons. As this report has discussed above, the Executive Branch may exercise its constitutional authority to engage in certain forms of surveillance without the prior approval of the Judicial Branch only if it determines whether the facts justify the surveillance, renders a formal, written authorization, and places a time limitation upon the surveillance. The authorizing officer must act pursuant to an express, written delegation of presidential authority. The East Coast Project, and anything similar to it, would not satisfy these standards: much of the program was unreasonably broad in scope, it was not explicitly authorized in writing, and it was not subjected to frequent reexamination to determine whether continuation was appropriate. The requirement of a formal, written authorization means that

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the "plausible deniability" concept may never again be used as an excuse for lack of evidence of lawful authority.

The establishment of a program of surveillance could be justified only by the President's foreign affairs powers. But the existence of such powers does not validate every action taken in their name. There must in each case be a sufficient basis, measured in light of the private interests the surveillance invades, for believing that the surveillance is necessary to serve the important end that purportedly justifies it. It must, in other words, be reasonable in scope and duration, as "reasonable" has come to be defined by the courts in cases involving wiretapping. No open-ended authorization of the sort involved in the East Coast Project would be sufficient. The Department does not suggest that this means that there must be probable cause to believe that every letter sought to be opened under such an authority would contain foreign intelligence information, any more than there must be probable cause to believe that every telephone call that might be overheard during a wire interception for criminal investigative purposes will include a discussion of crime. But there must, at a minimum, be a determination that the facts justify the surveillance and that it is no more intrusive

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than is necessary to that end.^{34/} The standards that guide presidential conduct and the conduct of the Department of Justice draw their substance from the evolving principles of Fourth Amendment jurisprudence. Under those standards the East Coast Project could not now lawfully be approved.^{35/}

^{34/} Cf. United States v. Martinez-Fuerte, 428 U.S. ___, 96 S. Ct. 3074 (1976) (cars may be stopped without probable cause or a warrant for a brief scrutiny, so long as the overall program of stopping cars is reasonable and productive); Camara v. Municipal Court, 387 U.S. 523 (1967) (warrants to search houses may be obtained on probable cause to believe that a building code violation has occurred).

Building on this and similar Supreme Court analyses, the Administration proposed legislation to provide for the issuance of a judicial warrant authorizing the use of electronic surveillance in foreign intelligence and foreign counterintelligence cases. That legislation would have required proof of probable cause that the target of the surveillance was a foreign power or an agent of a foreign power and a submission of a certification signed by a high level executive official that the information sought was necessary to the foreign intelligence or foreign counterintelligence needs of the federal government. It also required the court's review of procedures to minimize the acquisition and retention of extraneous information.

^{35/} See United States v. Brown, *supra*; United States v. Butenko, *supra*; United States v. Ehrlichman, *supra*. On the constitutional standards for the approval of domestic wiretaps, see Berger v. New York, 388 U.S. 41 (1967); Katz v. United States, *supra*; United States v. Kahn, 415 U.S. 143 (1974); United States v. Scott, 516 F.2d 751 (D.C. Cir. 1975); certiorari denied, 425 U.S. 917 (1976). Cf. United States v. Donovan, certiorari granted, 424 U.S. 907 (1976), argued October 13, 1976.

IV. CONCLUSION

The East Coast Project would now be illegal, and the Department would not hesitate to prosecute those who participated in such a program in the future. The applicable law has not always been so clear, however, so that a prosecution brought now for a course of conduct that spanned 1953 to 1973 might be unfair to defendants who believed that the program they were conducting began with presidential authorization and continued with this assumed authority. Finally, because of difficulties of proof that have been brought about by the lack of written documentation, the lapse of time, the fading of memories, and the deaths of key participants, the Department does not believe it could prove beyond a reasonable doubt that the potential defendants are criminally responsible for their participation in the mail opening program.

Questions of the legality of intelligence methods and of the scope and exercise of the national security power did not reach the courts until this decade. The preceding sections of this report have described the development, primarily in the last ten years, of Fourth Amendment law governing the use by the Executive Branch of surveillance that invades privacy, and the principles that the Department believes now govern its scope and exercise. But whatever can be said about the law now,

the Department believes at the time the potential defendants acted, there was a substantial basis for thinking that the law was otherwise. What would make the contemplated prosecution particularly unfair is the fact that ignorance of the developing law, and the consequent existence of erroneous assumptions of legality, were in large part the fault of the government, and indeed the Department of Justice itself. The Department's own attitudes toward mail openings as a means of gathering foreign intelligence must have appeared at least equivocal. Although after 1966 the FBI did not engage in mail opening, it participated in and was the primary beneficiary of the CIA's East Coast Project. On two occasions early in the 1960s the Department considered criminal prosecutions that would have been based in part on evidence derived from FBI mail openings. In each case the Department declined or withdrew prosecution. Whether it did so because it feared that the evidence would be excluded as illegally obtained, or whether it did so to avoid revealing the existence of the mail opening projects, the effect was the same: it allowed the programs to go on as before, and it did not instruct the FBI or the CIA to cease opening mail. What is more, in the mid-1960s, in connection with Senate subcommittee hearings on possible governmental monitoring of the mails, and again in the early 1970s,

the available evidence indicates that the then Attorneys General probably were informed generally of the CIA's activities and, in the latter instance, of their possible scope. Again, no steps were taken to determine what the programs encompassed or to question in any way their legality.

During the period in which the mail openings took place, there was no clear control to ensure that arguably valuable intelligence techniques would be employed only with careful attention to their legality and their effects on individual rights. The absence of defined control was perhaps in part the result of the necessary secrecy, even within the government, that attends intelligence operations, and of the desire for "plausible deniability" by the President. Whatever its cause, the failure of officials at the highest levels who were generally aware of these activities (though they did not participate in them) to clarify the law and establish institutional controls, and their apparent contentment to leave the individuals operating in this field to proceed according to their best estimates of legal constraints in a vague and yet vitally important area -- all this would render a prosecution by the government hypocritical. What really stands indicted as a result of the information which the Department's investigation has disclosed is the operation of the government as an institution: specifically, its failure to provide adequate guidance to its

subordinate officials, almost consciously leaving them to "take their chances" in what was an extremely uncertain legal environment.

One of the purposes, if indeed not the primary purpose, of the criminal law is not merely to punish past wrongdoing but to prevent wrongdoing in the future. If the present prosecution were the only way, or even an effective way, of achieving that result, it might be considered desirable despite elements of unfairness and the almost certain lack of success in obtaining convictions. It is of course recognized that whether a conviction could be achieved only can be determined by the bringing of a prosecution. The failure to convict, however, would hinder the development of the standards that we believe the law now establishes. The Department believes that the objective of preventing repetition of such activity can better be achieved by other means.

Substantial institutional changes in order to assure adequate protection for individual rights in the conduct of intelligence operations have already been made. Executive Order 11905 clearly delineates the proper responsibilities of each of the intelligence agencies and establishes a detailed structure of oversight and approval which includes substantial

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participation by the Attorney General. Moreover, this report itself, which is a departure from normal Department practices, is meant to serve the purpose of clearly and publicly describing the Department's view of the current law. It serves as guidance for all federal officials acting in this area, and as fair notice that any failure in the future to comply with these newly developed but now clearly enunciated standards will result in prosecution.